TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 323.

PACIFIC MAIL STEAMSHIP COMPANY, PETITIONER,

vs.

ED. SCHMIDT.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 14, 1916.
CERTIORARI AND RETURN FILED APRIL 10, 1916.

(24,512)

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a

Original.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Apostles.

Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

1 [Title of Court and Cause.]

Præcipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare for respondent in the above-entitled action the Apostles, viz., a certified copy of the entire record as filed with the exception of the Notice of Filing Bond for Costs and Staying Execution; Order Staying Execution and the Præcipe for Citation, etc., also a statement as required by Rule 4, Section 1, sub. 1, of the Admiralty Rules of the Circuit Court of Appeals.

KNIGHT & HEGGERTY,
Proctor for Respondent.

[Endorsed:] Filed Dec. 4, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. (1*)

[Title of Court and Cause.]

Statement of Clerk U. S. District Court.

Parties.

Libelant: Ed. Schmidt.
Respondent: Pacific Mail Steamship Company, a corporation.

Proctors.

Libelant: James W. Ryan, Esquire, San Francisco, California.
Respondent: Messrs. Knight and Heggerty (Chas. J. Heggerty, Esquire, appearing in the case), San Francisco, California. (2)

* Page-number appearing at foot of page of original certified Record.

2 Proceedings.

1913.

October 20. Filed verified Libel for wages.
Issued Citation for the appearance of the respondent herein and which said Citation was afterwards on the 25th day of October, 1913, returned and filed in this office with the return of the United States Marshal endorsed thereon, as follows:

"I have served this Writ personally by handing copy of this Writ to Charles J. Heggerty, Proctor for Respondent, whose admission of service is endorsed hereon at San Francisco, California, this 21st day of October, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By GEO. H. BURNHAM,
Chief Office Deputy.

The defendant Pacific Mail Steamship Company in the within entitled cause hereby admits service of the within Citation this 21st day of October, 1913.

PACIFIC MAIL STEAMSHIP COMPANY,
By KNIGHT & HEGGERTY, *Its Proctors.*"

3

October 25. Filed Answer of Pacific Mail Steamship Company, to the Libel herein.

October 27. Filed libelant's Exceptions to Respondent's Answer.

October 29. The Exceptions filed herein to the Answer of the respondent, this day came on for hearing in the District Court of the United States for the Northern District of California, First Division, before the Honorable M. T. Dooling, Judge. (3)

After hearing counsel for the respective parties the Court ordered the said exceptions overruled and that counsel proceed with the trial of said cause. Thereupon after the producing of witnesses and arguments of counsel the cause was submitted, and after consideration the Court filed its written opinion in favor of the libelant.

November 5. Filed Decree.

November 14. Filed Notice of Appeal.

November 18. Filed Assignment of Errors.

November 22. Filed Transcript of Testimony taken in open court. (4)

4 In the District Court of the United States, Northern District of California, First Division.

In Admiralty. No. —.

ED. SCHMIDT, Libelant,
vs.
PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Respondent.

Libel for Mariner's Wages.

To the Honorable Maurice T. Dooling, Judge of the District Court of the United States in and for the Northern District of California, First Division:

The libel of Ed. Schmidt, mariner, late chief steward on board the American steamship "City of Sydney," and a resident of the City and County of San Francisco, State of California, against Pacific Mail Steamship Company, a corporation duly created, organized, and existing under and by virtue of the laws of the State of New York, and having its principal place, or one of its principal places, of business at the City and County of San Francisco, State and Northern District of California, and engaged in the business of carrying passengers and cargo by sea, now or late owner of said steamship "City of Sydney," in a cause of wages, civil and maritime, alleges as follows:

I.

5 That in the month of September, one thousand nine hundred and thirteen, at the port of San Francisco, in the State and Northern District of California, the said respondent, the said Pacific Mail Steamship Company, a corporation, by its agent or (5) agents, did hire the libelant to serve as chief steward on board the said steamship "City of Sydney," for part of a voyage from the port of Balboa, in the Republic of Panama, to said port of San Francisco, and for part of a voyage from said port of San Francisco to said port of Balboa, at the wages of one hundred dollars ($100.00) per month and an allowance of one dollar ($1.00) for each and every day as victualling money; and that in pursuance of said agreement the libelant entered into the service of the respondent as such chief steward on board the said steamship on or about the forenoon of the twenty-fifth day of September, in the year aforesaid.

II.

That the said steamship "City of Sydney," having taken the libellant on board as chief steward, discharged her cargo, and made freight, and completed her voyage from the said port of Balboa to the said port of San Francisco; and immediately thereafter began taking, and thereafter continued to take, on board a cargo for a

voyage from the said port of San Francisco to the said port of Balboa, with the libelant on board as chief steward.

III.

That on or about the evening of the first day of October, in the year one thousand nine hundred and thirteen, and after the said steamship "City of Sydney" had taken on board part of said
6 cargo for said voyage from the port of San Francisco to the port of Balboa, the respondent, by its agent or agents, without any cause, and without the consent of the libelant, and against his will, turned him on shore, and would not permit him to perform any part of the remainder of said voyage, and the said steamship is now making the said voyage and is not now within the Northern District of California.

IV.

That during the whole time the libelant was on board the said steamship "City of Sydney" he well and faithfully performed his (6) duty as such chief steward, and was obedient to all lawful commands of the respondent, by its agent or agents, whereby he became entitled to demand, and he did demand, and there was due to him at the time that respondent so turned him on shore, to wit, on the evening of the first day of October, in the year aforesaid, one-third part of the wages then earned by him, to wit, the sum of ten and 11/100 ($10.00) dollars, over and above all just deductions and whereby he became entitled to demand, and he did demand, and there was due to him, four days after respondent so turned him on shore, to wit, on the evening of the fifth day of October, in the year aforesaid, the balance of his wages under said agreement, to wit, the sum of twenty and 22/100 ($20.22) dollars, over and above all just deductions; and that no part of said wages and victualling money, or wages or victualling money, has been paid to libelant.

V.

That all and singular the premises are true, and within
7 the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libelant prays that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said Pacific Mail Steamship Company, a corporation, owner as aforesaid, and that it may be required to appear and answer, on oath, all and singular the matters aforesaid, and that this Honorable Court *would* be pleased to decree the payment by respondent to libelant of the wages and allowance for victualling money aforesaid, to wit, the sum of thirty and 33/100 ($30.33) dollars, with interest and costs, and a sum equal to one day's pay for each and every day during which payment of said wages and victualling money has been de-

layed beyond the evening of the first day of October, in the (7) year aforesaid, to wit, the sum of eighty-two and 27/100 ($82.27) dollars, and a sum equal to one day's pay for each and every day during which payment of said wages and victualling money shall be delayed beyond the date of the filing of this libel, together with interest; and that the libelant may have such other and further relief in the premises, as in law and justice he may be entitled to receive.

JAMES W. RYAN,
Proctor for Libelant.

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

Ed. Schmidt, being first duly sworn, deposes and says that
8 he is the libelant in the foregoing libel; that he has read the same and knows the contents thereof, and that the said libel is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters that he believes it to be true.

ED. SCHMIDT.

Subscribed and sworn to before me this 20th day of October, 1913.

[SEAL.] W. B. MALING,
U. S. Commissioner.

[Endorsed:] Filed Oct. 20, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (8)

Citation for Appearance of Respondent.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

[SEAL.]

The President of the United States of America to the Marshal of the United States for the Northern District of California, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Northern District of California, on the 20th day of October, in the year of our Lord one thousand nine hundred and thirteen.

By Ed. Schmidt vs. Pacific Mail Steamship Co., in a certain action for wages, civil and maritime, to recover the sum of $112.60, and Int. (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant and praying that a citation may issue against the
9 said respondent, pursuant to the rules and practice of this Court; now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if —— shall be found in your Dis-

trict, that —— be and appear before the said District Court, on the 25th day of October, A. D. 1913, at 10 o'clock in the forenoon, at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make —— allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness, the Honorable M. T. Dooling, Judge of said Court, the 20th day of October, in the year of our Lord, one thousand nine hundred and thirteen and of our independence, the one hundred and 38th.

W. B. MALING, *Clerk,*
By C. W. CALBREATH,
Deputy Clerk.

JAMES W. RYAN, *Proctor.* (9)

Marshal's Return.

I have served this writ personally by handing copy of this Writ to Charles J. Heggerty, proctor for respondent, whose admission of service is endorsed hereon at San Francisco, California, this 21st day of October, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal,
By GEO. H. BURNHAM,
Chief Office Deputy Marshal.

10 The defendant Pacific Mail Steamship Company in the within entitled cause hereby admits service of the within citation this 21st day of October, 1913.

PACIFIC MAIL STEAMSHIP COMPANY,
By KNIGHT & HEGGERTY, *Its Proctors.*

[Endorsed:] Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (10)

[Title of Court and Cause.]

Order Shortening Time within Which Respondent May Appear and Answer.

Good cause appearing therefor, it is hereby ordered that the time within which Pacific Mail Steamship Company, a corporation, the respondent above-named, may appear and answer to the libel filed by libelant, the said Ed. Schmidt, in the above-entitled cause, will be, and hereby is, shortened so that said respondent must appear and answer the said libel on or before Saturday, the 25th day of October, 1913.

Dated, San Francisco, Cal., October 20, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed:] Filed Oct. 20, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (11)

11 [Title of Court and Cause.]

Answer to Libel.

To Honorable Maurice T. Dooling, Judge of the District Court of the United States in and for the Northern District of California:

Comes now the Pacific Mail Steamship Company, the respondent above named, by its Proctors Knight & Heggerty, and answers the Libel filed herein by Ed Schmidt, libelant, as follows, to-wit:

1. Answering Article I of the Libel, respondent denies that libelant was ever hired to serve as chief steward of said vessel for a part of a voyage on said vessel from Balboa to San Francisco, or for part of a voyage from San Francisco to Balboa, or that he ever entered upon or performed any services under any such employment at the wages alleged or at any wages or at all; or as chief steward or a seaman on said vessel; but avers that libelant was a member of the crew of said vessel and signed articles as chief steward thereon for the round voyage in July, 1913, from San Francisco to Balboa and return to San Francisco, that on the return of said vessel to San Francisco prior to September 25, 1913, and after she was made fast at her dock and had (12) finished her said round voyage the said employment of libelant ceased his employment as a seaman on said vessel ended and he then ceased to be a member of the crew of said vessel and was paid off in full his wages as a member of the crew of said vessel; that on about September 25, 1913, respond-
12 ent employed libelant on shore wages and not as a member of the crew of said or any vessel and not as chief steward of said or any vessel, but to render and perform shore services for the respondent on its dock and about said vessel in the City and County of San Francisco and not otherwise; that libelant never did sign or enter into any shipping articles upon or about said or any vessel after said vessel had returned and tied up to her dock on her return from said round voyage, or after he had been paid off in full through and by the United States Shipping Commissioner on the return of said vessel to this port; and that said vessel has no crew or chief steward while she is in port or until she is ready to sail on her voyage, at which time every member of the crew of said vessel signs shipping articles before the United States Shipping Commissioner, and cannot become a member of the crew of said vessel and sail from port without signing such articles, and on the return of said vessel to this port her entire crew, including libelant, who had signed articles as chief steward thereon, was paid off by and through said United States Shipping Commissioner.

2. Answering Article II of said Libel, respondent denies that libelant was taken on board said vessel, or was on board said vessel or rendered service on said vessel as chief steward after the time she returned on said round voyage and after the time he was paid off as such chief steward and discharged from the shipping articles, as chief steward of said vessel, or that said vessel thereafter had or

could have a chief steward until she was ready to sail and
13 her crew and a member of her crew should sign shipping articles as such chief steward. (13)

3. Answering Article III of said libel, respondent denies that it turned libelant on shore, or that it did so without any cause or would not permit him to perform the remainder of said voyage; but avers that from the time libelant was paid off as chief steward of said vessel on her return from her said round voyage and after he had signed off the articles and received his wages and had been paid in full through and by said Shipping Commissioner, he never was or became or was upon or rendered or performed any services on said vessel as chief steward; and that he only performed port service, and was employed on shore or port service upon shore or port wages, and not otherwise; that said libelant is not a mariner and that his alleged wages are not a mariner's or seaman's wages.

4. Answering Article IV of said libel, respondent denies that during the whole time libelant was on board said vessel he well or faithfully performed his duty as chief steward, or that he ever became entitled to or to demand or ever did demand that there was due him any sea pay or any pay or wages for services as chief steward of said vessel, or that there was ever due him any of the sums of money alleged in said libel; or that there is now or ever was due libelant or unpaid to him any sum or amount or balance for or on account of his wages or his services as chief steward of said vessel; but, on the contrary, that he has been and was paid in full for all of his services on said vessel as a member of the crew thereof as such chief
14 steward upon the termination of said round voyage, and he never signed on said vessel again as such chief steward or at all; that he did after said vessel had been made fast to her dock and her said round voyage had terminated receive his wages in full by and through said Shipping Commissioner and before the said commissioner he did sign off the said articles as such chief steward and thereupon ceased to be such chief steward (14) of said vessel, and was never signed on said articles again as cheif steward or at all; that after the libelant had so signed off the articles as such chief steward and had been paid off his wages as such in full, he went on shore duty and shore pay and not as a member of the crew of said vessel, and he earned wages as such amounting to $30.33 on the port pay-roll of the said vessel; that while libelant was the chief steward of said vessel and upon the shipping articles as such upon said round voyage to Balboa and back to San Francisco, leaving this port in July, 1913, and returning in September, 1913, he received into his care and custody, the respondent delivering into his possession and safekeeping as such chief steward, the following personal property, viz:

5 Vegetable deep dishes, large, silver-plated, each of which was of the reasonable value and which were valued at $5.50, or a total of $27.50;

6 Table Forks, Silver Plated, valued at $1.12;

5 Table Knives, Silver Plated, valued at $1.25;

2 Dessert Spoons, Silver Plated, valued at .43;

12 Tea Spoons, Silver Plated, valued at $1.70;

12 Messroom Spoons, German Silver, valued at .90;
15 and all being of the reasonable value of the total sum of $32.90; that said libelant did not return the said personal property to respondent or account for the same, and that libelant has never returned or redelivered the said personal property to respondent, nor has he accounted for the same in any manner; and that he has persistently refused to account to respondent for the said personal property or pay to the respondent the said or any value thereof; and that respondent has at all times been ready and willing and has offered to pay to libelant the said port pay and wages of $30.33 upon libelant returning to respondent the said personal property or paying to respondent its value, and that respondent (15) has refused and now refuses to pay to libelant his said port pay and wages of $30.33 unless and until he shall return *to* redeliver said personal property to respondent and account to respondent therefor; and that said debt and obligation due to the respondent by libelant offsets and discharges libelant's claim for wages.

5. Answering Article V of said libel, respondent denies that all and singular or all or singular the premises in said Libel are true or within the Admiralty and Maritime jurisdiction of the United States or of this Honorable Court; but avers that all of said alleged services rendered by libelant were and are shore and port services and not a sea service, and that said services were not and are not seaman's services and said libelant was not a seaman or mariner in the performance thereof, and that said alleged
16 demand and claim is not a claim or demand for and the said services and wages do not constitute and are not a seaman's wages or a mariner's wages, or within the jurisdiction of Court of Admiralty.

Wherefore, respondent prays to be hence dismissed with its costs, and that said Libel be dismissed with costs to respondent.

Dated: October 25th, 1913.

KNIGHT & HEGGERTY,
Proctors for the Respondent. (16)

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

A. J. Frey, being duly sworn, says: I am assistant manager of the respondent; I have read the foregoing Answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

A. J. FREY.

Subscribed and sworn to before me this 25th day of October, 1913.

[SEAL.] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (17)

[Title of Court and Cause.]

Exceptions of Libellant to Answer.

The libellant above-named hereby excepts to the answer of
17 Pacific Mail Steamship Company, a corporation, respondent in this cause, as follows:

I.

That the allegations in the fourth article of said answer on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are irrelevant, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or transaction or contract set forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of September, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid.

II.

That the allegations in the fourth article of said answer (18) on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are impertinent, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or trans-
18 action or contract set forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of September, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid.

III.

That the allegations in the fourth article of said answer on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are insufficient, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or transaction or contract set forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of Septem-

ber, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid.

In which particulars the libellant insists that the respondent's said answer is irrelevant and impertinent and insufficient: wherefore the libellant excepts thereto, and prays that the allegations of said answer excepted to as aforesaid may (19) be expunged with costs.

JAMES W. RYAN,
Proctor for Libelant.

19 [Endorsed:] Filed Oct. 27, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (20)

At a Stated Term of the District Court of the United States for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 29th day of October, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable M. T. Dooling, Judge.

No. 15483.

ED. SCHMIDT, Libelant,
vs.
PACIFIC MAIL STEAMSHIP COMPANY, Respondent.

Order Overruling Exceptions to Answer, etc.

This cause this day came on for hearing on the Exceptions to the Answer filed herein, and after hearing counsel for the respective parties, by the Court ordered that said Exceptions be and the same are hereby overruled.

The hearing of the cause was then proceeded with, James W. Ryan, Esq., appearing for libelant, and Chas. J. Heggerty, Esq., appearing for respondent. Mr. Ryan called Edward Schmidt, who was fully sworn and examined as a witness in his own behalf. Mr. Heggerty called W. E. Deazie and Alexander B. Muir, who were each duly sworn and examined, and thereupon after hearing arguments said cause was submitted to the Court for decision.

20 After due consideration had thereon the Court filed its written opinion, and by the Court ordered that a decree be entered in favor of the libelant for the amount prayed for in his libel. (21)

[Title of Court and Cause.]

Testimony Taken in Open Court.

WEDNESDAY, October 29, 1913.

Counsel appearing:

For the Libelant—James Ryan, Esq.

For the Respondent—Messrs. Knight & Heggerty (Charles J. Heggerty, Esq.).

The above-entitled cause came regularly on for trial this Wednesday, October 29, 1913, before the Court sitting without a jury, and the following proceedings took place:

[*Testimony of Ed. Schmidt, the Libelant.*]

ED. SCHMIDT, the libelant, sworn:

Mr. Ryan:

Q. What is your name?
A. Ed. Schmidt.
Q. How old are you?
A. 44.
Q. What is your occupation?
A. I have not done anything since October 1st; before that I had been chief steward on different boats, lately on the steamer "City of Sidney."
Q. Have you been employed since you left the steamer "City of Sidney"?
A. No, sir.
Q. Where do you reside?
A. 550 Eddy Street.
Q. What is that—is it a hotel
A. A hotel.
Q. Did you sign shipping articles with respondent in this
21 case before the Shipping Commissioner in July, 1913?
A. No, sir. (22)
Q. You did not sign shipping articles?
A. I did sign shipping articles, yes, sir.
Q. When did you return from that voyage?
A. On September 23.
Q. And then you were paid by the Shipping Commissioner here?
A. Yes, sir.

Mr. Heggerty: Let him testify, Mr. Ryan, and do not lead him.

Mr. Ryan:

Q. What was the procedure after you returned from the voyage regarding receiving your money?
A. I got paid off by the Shipping Commissioner, my wages due to me for that voyage.
Q. What was your understanding regarding your remaining employed?

Mr. Heggerty: We object to his understanding.
Mr. Ryan: I withdraw the question.

Q. Why did you remain on board the ship?
A. I was still chief steward on the boat and not notified I had been discharged for anything and I worked on board as chief steward.
Q. What are the duties of the chief steward on the steamer?
A. During the voyage?

Q. Yes, during the voyage.
A. He is simply the head of the Commissary Department, keeps the rooms clean and look- after the passengers and so on.
Q. What else?
22 A. To look after his help and see that the work is done.
Q. What does the chief steward do?

The Court:

Q. You have charge of the rooms of the passengers, have you?
A. Yes, sir.

Mr. Ryan:

Q. What does the chief steward do after he arrives in port?
A. After he arrives here we clean the ship.
Q. You mean you superintend it?
A. Yes, and see that the stores are put on board for the next voyage, get the ship ready for sea (23) for the next voyage.
Q. Is your work while in port very similar to that while on the voyage?
A. Yes.

Mr. Heggerty: Let him state what he does.

Mr. Ryan:

Q. What is the difference between your duties while on the voyage and while the ship is in port?
A. The difference is we have no passengers on board, while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage.
Q. When are the supplies ordered and who orders them?
A. I put in a requisition for supplies and deliver the requisition-book to the port steward.
Q. Who places those provisions on board?
A. The chief steward—he sees that it is put on board.
Q. How many men are employed under you while the vessel is on the voyage?
23 A. The steward's department, or what they call the Commissary department in that company, has 22.
Q. That includes the title of what positions?
A. The steward, the steerage cooks and bakers, butchers, cooks, waiters.
Q. How long after the ship arrives at the dock do the seamen go before the Shipping Commissioner and receive their wages?
A. Generally it is the day after.
Q. And how long before the vessel leaves the dock do the seamen go before the Shipping Commissioner and sign new articles?
A. One day before leaving on that voyage.
Q. Who employs the men under you?
A. I employ them myself.
Q. Who employs you?
A. The port steward of the company.

Q. He employed you for the voyage to Balboa too?

A. Yes, sir.

Q. It is stated by defendant in its answer that certain vegetable dishes, table forks, dessert spoons, knives, teaspoons and 12 mess-room spoons were delivered to you before you went to Balboa; were (24) those articles delivered to you?

A. They were not directly delivered to me; it was stated that the articles were on board the ship; they had not been counted out to me by other company officials.

Q. Did you see the statement of the articles in your de-
24 partment on board the ship before going to Balboa?

A. I did not.

Q. How many days before the ship left were you employed as chief steward?

A. About two days before.

Q. Was any inventory taken in your presence before the ship left this port?

A. No, sir.

Q. Did you sign any paper acknowledging the receipt of these articles?

A. I did not.

Q. Did you know that these articles were on board at any time during the voyage?

A. I counted the small articles such as knives, forks, spoons and so on, and more or less there are always a few missing.

Q. Five vegetable dishes?

A. I did not count them; I always have enough for my service; I never run short of any.

Q. Where are these articles placed on a voyage?

A. The vegetable dishes particularly are in the pantry.

Q. And the other articles?

A. The other articles in that ship are in the dining-room, locked up in the locker.

Q. But during meal hours where are they?

A. After the ship is at sea it is open all the time.

Q. Who has access to the rooms where these articles are during the daytime and the night time, who has access to these dishes, and so forth?

A. Whoever uses them, the waiters and so forth, they help themselves, to set the table.

Q. Do the passengers have access to the rooms where these articles are?

A. No, they do not.

25 Q. During the meal times these articles are placed on the table?

A. Yes, sir. (25)

Q. If any of these articles were missing from the tables after meals would you know it, would it be reported to you?

A. No, you would not know it.

Q. Before the ship left on the voyage to Balboa, where were these articles on the ship?

A. Such as knives, forks and spoons were in the dining-room; all silver, ladle dishes, such as the vegetable dishes, were in the pantry.

Q. Could anyone going on board the ship have access to the room where these articles were?

A. In the pantry, yes, at any time.

Q. Anybody going on board the ship?

A. Yes, sir.

Q. Would it have been possible for a stranger or a seaman or any other person to have gone on the ship before the ship left on the voyage to Balboa and have taken any of these articles, before you were employed as seaman?

Mr. Heggerty: I object to that as highly leading and suggestive.

Mr. Ryan: I simply ask if it is possible for anyone to take the articles.

The Court: He has already said that the articles while in port were accessible to anybody. You have that same failing that other attorneys have; you think the Court cannot understand as well as you can understand what the witness says.

Mr. Ryan:

Q. Where did you perform your duties while the vessel
26 was in port?

A. On board the ship.

Q. Would you ever have any duties on the dock? Did you do any work on the dock?

A. The only duties I would do is commissary credits, such as wine or beer bottles, to be delivered on the dock and count them out and so forth.

Q. But you remained on the vessel all the time then?

A. Oh, yes.

Q. Could you sleep there at night, or did you sleep there at night?

A. I could remain there if I wanted to; my room is there. (26)

Q. Mr. Heggerty said there was a different contract after the shipping articles are signed, and a different rate of pay; after you had been paid by the Shipping Commissioner you remained at the vessel at the same rate of pay?

A. At the same rate and one dollar for meal money because we don't cook on board the ship.

Q. How many persons were employed on board the ship as seamen who are entitled to that?

A. Only officers.

Q. After the ship arrived in port from Balboa how long did it take for it to discharge its cargo, or about how long, or was it discharging its cargo during all the time you were on board the vessel?

The Court:

Q. Was this at Balboa or was it at San Francisco?

A. San Francisco.

Mr. Ryan:

Q. After the vessel arrived in San Francisco, upon its return

from Balboa, was the vessel discharging and receiving new
27 cargo during all the time you were on board the vessel?

A. During all the time, so far as I know.

Q. And the men were working on it all the time?

A. Yes, sir.

The Court:

Q. Has this ship regular sailing-day dates?

A. Yes, sir, a regular schedule.

Mr. Ryan:

Q. How long have you been a chief steward?

A. I have been since 1910.

Q. What did you do before that?

A. I was butcher, in the same employ, two years.

Q. Who hired you on the voyage to Balboa and return?

A. The port steward.

Q. That was on what day—what time of day?

A. I don't know that I got that appointment here, or not.

The Court:

Q. Was this the July appointment?

A. July 22d. (27)

Q. You misunderstood me. Did you receive your money from the Shipping Commissioner?

A. Yes, sir.

Q. What day?

A. September 24.

Q. What time of day?

A. During the noon hour.

Mr. Ryan:

Q. Then you remained on board the vessel for how long?

A. Until October 1st in the P. M.

Q. At what o'clock?

A. At 5 o'clock.

Q. Is that the regular time for quitting?

A. That is the time we are supposed to be off work.

Q. How did you happen to leave the vessel?

28 A. Well, on October 1st, at 4 o'clock, the port steward brought a man there to relieve me, stating that I am relieved from that ship; the time was up at 5 o'clock that night.

Q. Did you receive any other word from the agent of the steamship company?

A. I received a paper of discharge from the Pacific Mail Steamship Company.

Q. Have you that paper of discharge with you?

A. No, I tore that up.

Q. What did that paper of discharge state?

A. It was addressed to me as chief steward, steamship "City of Sidney." "Dear Sir: You are hereby detached from the steamship 'City of Sidney' and as we don't know how soon we can utilize your

services, we suggest that you look for employment otherwise or seek employment otherwise."

Q. That letter was addressed to you as chief steward?

A. Yes, sir.

Q. When did you destroy that letter?

A. Right after I received it.

Q. Why?

Mr. Heggerty: What difference does that make?

Mr. Ryan: I want to show that he did not destroy it so that it could not be produced in court here.

The Court: Oh, I suppose he destroyed it because he was provoked. (28)

Mr. Ryan:

Q. Has any part of the wages on that voyage to Balboa,
29 after the time the ship arrived at the dock here, been paid to you?

A. No.

Q. Did you receive any money at all for your work on the ship here after it returned from Balboa?

A. I did not.

Q. Was it your understanding upon your return from Balboa on that trip and your receiving the money from the Shipping Commissioner under the shipping articles that you were to cease to be a member of the crew of said steamer "City of Sidney"?

A. No, sir——

Mr. Heggerty: Just a moment; we object to what his understanding was; he can state the facts.

Mr. Ryan: If your Honor please, there was a contract entered into then and he can state what the terms of the contract were. The answer states that he ceased to be a member of the crew of the vessel at that time. We contend that there was an implied contract entered into.

The Court: He has stated that he did remain on board because he had not been discharged, and he was performing the services around there incident to the duties of a steward when employed.

Mr. Ryan: I have already asked him whether it was usual for seamen if they were not discharged after being paid by the Shipping Commissioner to remain on board at the same rate of wages. That is the implied contract. He can state his understanding of the terms of the contract.

The Court: You may ask him, if you have not done so
30 already, what the custom was in that regard.

Mr. Ryan:

Q. What was the custom, after a seaman had been paid by the Shipping Commissioner, as to whether or not they should remain in the service of the steamship?

A. The custom was if the company did not want to keep the man

there if they did not discharge him he would remain there and do the work of chief steward. (29)

Q. Was it not the custom of the steamship companies at this port——

Mr. Heggerty: Mr. Ryan, you had better let him testify.

The Court: He has told you that, Mr. Ryan; he has told you that the custom was for the steamship company to discharge those they did not wish to re-employ.

Mr. Ryan:

Q. Did they tell each man definitely that he was discharged?

A. Not on the return, no.

Q. How would they know that they were not to remain on board the vessel?

Mr. Heggerty: He has already stated, your Honor, that those who were to be discharged they discharged, and those who were not discharged remained there.

Mr. Ryan: But I am asking for the terms of the discharge, how it was made evident.

Mr. Heggerty: But if he was not discharged what is the difference about anybody else?

31 Mr. Ryan: I want to show that the company wanted him to remain on board as chief steward. We certainly have a right to show the terms of the contract.

The Court:

Q. How were the men discharged when they got into port if they were not to be re-employed?

A. They simply kept on their work.

Q. How would they know that they are still employed there?

A. If they are not notified they still keep on in the same position.

Q. When they were discharged were they notified?

A. Yes, sir.

Q. By whom?

A. By a letter from the Flood Building; from the office. For instance, my letter I got the day after I got discharged.

Q. Would that be true of the men under you—would you tell any man you did not want?

A. I would just tell him he was finished, your time is up at (30) 5 o'clock.

Q. And he leaves?

A. Yes.

Q. And if you did not tell him that his wages would go right on?

A. Yes, sir.

Mr. Ryan:

Q. And with reference to the officers, it was customary for them to receive a letter from the steamship company, was it?

A. Yes, sir.

Q. And the chief steward is an officer of the vessel?

32 A. Oh, yes, he is a superior; any man who has somebody under him is a superior.

Q. Did you ever employ men on the vessel while it is in port and before they sign shipping articles intending that they shall go on a voyage?

A. I do. I discharge and employ.

Q. Is the signing of shipping articles necessary before a man takes a place under you, and before you take your place on board the ship as a seaman for a voyage to a foreign part? Is it necessary that he go before the Shipping Commissioner and sign shipping articles before he takes employment as a seaman on that vessel?

A. No; I employ him during the time and then when the time comes the member is to sign shipping articles.

Q. Then all the members go down and sign the articles before the Shipping Commissioner?

A. Yes, sir.

Q. From whom do you receive your money for your wages from the time you are employed on the vessel in port or when you are held over in port, to the time when you sign shipping articles?

A. On the same day, as a rule, when you sign shipping articles in port, before leaving you sign them, and then you get your money from the purser of the ship.

Q. Why did the steamship company discharge you?

A. No particular reason that I know of. I simply got a

33 paper of discharge stating for me to seek employment elsewhere, that they cannot tell how soon they can utilize my services. (31)

Q. When did you ask for your money as Port Steward from the steamship company?

A. You mean as the chief steward in port?

Q. Yes.

A. It was October 3d or 2d; October 2d.

Q. Was that before or after you received the letter from the steamship company?

A. That was before I received that letter.

Q. Was it after you had been notified that a new chief steward had taken your place?

A. It was after.

Q. What did you do when you went to see them regarding your wages, to whom did you go?

A. I went to the purser on the ship, who pays off, there on that day.

Q. What did you say to him?

A. I went there and asked him for the port pay due to me and the answer was that the auditor did not give him the money for me, and for me to see the auditor. I went up to the Flood Building and asked him about my wages due him and he answered me that I owed him $32.90 for silver missing on the ship; that my wages amounted to $30.30, and he cannot do anything for me.

Q. How many and of what value are the articles that are usually

lost in the Commissary Department while a vessel is on a voyage from Balboa here?

Mr. Heggerty: We object to that, your Honor, as immaterial, irrelevant and incompetent, and there is nothing in showing
34 something that is usually lost.

The Court: I suppose he means the ordinary breakage, and so on.

Mr. Ryan: That is what I asked. I understood by "lost" to mean by breakage.

Q. What articles and of what value are the articles which are broken, or stolen by passengers and other persons from the Commissary Department during the voyage of a ship from Balboa to San Francisco?

Mr. Heggerty: I object to that. I don't suppose there is any custom about the stealing of such articles. (32)

Mr. Ryan: I did not say custom; I said, what was the usual amount lost. I want to show this was a very unusual thing, that these five vegetable dishes should be lost.

A. As a rule, there is always more or less knives, teaspoons or such things lost; it averages about from $3.00 to $5.00 on a two-month's trip. Such a thing as vegetable dishes, I never heard of any loss before.

Q. Has that money, so far as you know, ever been deducted from your pay, or that of any other chief steward, before the Shipping Commissioner, for such breakage or loss?

Mr. Heggerty: We object to that. You ought to know that that is incompetent, Mr. Ryan.

Mr. Ryan: I withdraw the question.

Q. Did you understand that you were to pay for any
35 articles that were lost in your department?

Mr. Heggerty: We object to that, what his understanding was. He has not stated that he had any duties at all.

The Court: The objection is sustained. Whatever the terms of the contract are they are the terms and the Court has to construe them finally. It really is not necessary for you to anticipate the defendant's defense anyhow. Whatever the terms of the contract are it is a written contract, and unless there is some ambiguity about it, it is not what the witness understood or what either party understood, it is what the contract says.

Mr. Ryan: But, your Honor, he was on the vessel before he signed shipping articles to Balboa and he was on the vessel after he had been released from the shipping articles, and it is our contention that these articles may have been lost between those times.

The Court: If they were not lost under the terms of the shipping articles then probably he would not be responsible; but that is not because he understands it so, or because he says so, but it is (33)

because the law makes it so. The objection is sustained. Proceed with your examination.

Mr. Ryan: That is all.

Cross-examination.

Mr. Heggerty:

Q. When you went on the "Sidney" to perform the duties of chief steward, prior to sailing for Balboa, who took you to the vessel?

A. The port steward, Mr. Veazie.

36 Q. Was there any other steward there at the time that you and Mr. Veazie met?

A. Yes, sir.

Q. Who was he?

A. I don't know his first name. I think his name is Thurlow.

Q. What was done on the "Sidney" by you and Mr. Thurlow whatever his name was, the former chief steward, when Mr. Veazie took you to the vessel, concerning the property that you were to have charge of during that voyage?

A. I came on board the ship. I asked him, I wanted to take stock of the silverware; he could not find the keys; after finding a bunch of keys, none of them could open the locker. That is all there was to it. We went about other work. There was never a knife or a fork taken out of the locker and counted on the table; in fact, I could not open them until the morning of leaving. The saloon-boy had the keys; in fact, he could not open the drawers where the knives, forks and spoons were. I did not know how many vegetable dishes I had, whether 30 or 40 or 50, or what it was. There was no stock taken at all.

Q. Did you not have the equipment-book before you showing the amount of equipment that was on hand?

A. Not at that time, no.

Q. Before you sailed from San Francisco at all, did you not find out—did you not open the pantry and open the drawers and find out what was in them?

37 A. No, sir. (34)

Q. When did you open them?

A. The pantry is always open, where the silver dishes are.

Q. Are the silver dishes out on shelves—open?

A. Yes.

Q. Then you did not need a key?

A. Those are the silver-plated dishes.

Q. Did you see how many of those were there?

A. No, sir.

Q. Why?

A. I didn't have time; I had lots of other things to do. I did not know what crew I had on board.

Q. That was two days before sailing?

A. Yes, sir.

Q. Didn't you and Mr. Thurlow go over the property in the steward's department?

A. No, sir.
Q. Did not Mr. Veazie go over it with you?
A. No, sir.
Q. Nobody at all?
A. Nobody.
Q. You simply went on without knowing what was there?
A. I went on cleaning the rooms and having everything ready, and taking in stores, which was the most important thing to do. I saw that the stores came on board the ship and that none got lost and put them in the different places where they belonged.
Q. That is, you had an equipment-book where you entered down what you have?
A. That is during the voyage, for the stores.
38 Q. And when you start on the voyage do you know what you have on hand?
A. After I got the bills for the stores, I had to have it to make out my bills of fare and see that things run all right, after I got the bills.
Q. Haven't you got an equipment-book on the boat?
A. During the voyage, yes, sir.
Q. Didn't you go through that equipment-book and go through the steward's department to see whether the different property marked on that was there, or not?
A. I go through it to know how much linen I have, and things I have, (35) so I can run the boat, how many this and that and so on.
Q. Didn't you go through the culinary department?
A. Everything except the silver; I counted the knives, forks and spoons and small stuff once a week on the voyage. At Panama there is always a little more or less silver lost, knives and forks, but the big silver I didn't go through.
Q. You did not see that at all, or count it?
A. I seen it in the pantry.
Q. Did you bring back with you the same silver you took away?
A. To my knowledge.
Q. How do you know you brought back the same amount you took away?
A. As I said before, the silver in the pantry—the pantryman uses that, and that we put on the table, I always had sufficient.
39 I never was short of any; I always had sufficient for the comfort of the passengers.

Mr. Ryan: If your Honor please, I object to that question. I think maybe the witness misunderstands. Counsel said, "How many articles did you bring back with you?" It is not shown he brought any back or that he took any with him. It is putting words in the witness' mouth.

Mr. Heggerty: Oh, I think he can tell his own story about it.

The Court: Now, gentlemen, although this is not a very important matter, considering the amount involved, I must insist that it be conducted as any case in court should be; if you have any objec-

tion to make, Mr. Ryan, you will rise and make it formally and the Court will pass on it.

Mr. Ryan: Very well, your Honor.

Mr. Heggerty:

Q. Do you remember, before sailing on this voyage to Balboa and return, do you remember going to Mr. Veazie and telling him there were some things you could not find in the steward's department and in the culinary department, knives and (36) forks and silver?

A. Before sailing?

Q. Yes, before sailing?

A. You say something I could not find?

Q. Yes, that you had gone over the equipment and you could not find certain things that were marked there as on board?

A. I don't remember.

40 Q. Do you remember Mr. Veazie telling you they were up at the stores and were being refitted or replated, and that they were subsequently sent on and you signed for them?

A. I don't remember.

Q. After you came back you took an inventory of the property in the steward's department, did you not?

A. The assistant port steward took it with me.

Q. That was Mr. Muir, was it?

A. Yes.

Q. Do you remember finding any discrepancy in the amount that was on hand when you got back?

A. You mean any shortage?

Q. Yes.

A. According to the equipment-book, I did.

Q. For instance, the vegetable dishes and these articles?

A. According to the equipment-book, the company's equipment-book according to that; I did not know how much was on board. According to that they counted it out and it was short.

Q. You don't sleep on the boat, do you—you didn't while you were on board?

A. I can if I want to but at that time I did not.

Q. And you don't eat on board?

A. No.

Q. You are allowed one dollar a day in port for meals?

A. Yes, sir.

Q. You refused to pay, did you not, for the amount of these different articles that Mr. Muir claimed, or that it was claimed by the company was short in the equipment of steward's department?

41 A. I did, yes, sir.

Q. And then, as I understand you, they refused to pay your port wages?

A. Yes, sir. (37)

Mr. Ryan: That is our case, and if your Honor please, we are willing to submit it without argument.

Mr. Heggerty: Well, Mr. Ryan, aren't you going to give us a chance to put in any defense?

The Court: Yes, call your witnesses.

[*Testimony of William E. Veazie, for Respondent.*]

WILLIAM E. VEAZIE, called for the respondent, sworn.

Mr. Heggerty:

Q. What is your occupation?

A. Port steward of the Pacific Mail.

Q. Where are you located?

A. Pier 42.

Q. Where is the pier at which the "Sidney" docks on her return to this city from her voyages?

A. Usually at Pier 42.

Q. Do you remember the voyage preceding the last return voyage where she docked?

A. I think she docked at the Folsom Street dock.

Q. Do you remember the occasion of the "Sidney" sailing on that round voyage with Mr. Schmidt on the "Sidney" as chief steward?

A. Yes, sir.

Q. Who employed Mr. Schmidt as chief steward?

A. I recommended his employment to the main office.

Q. Who took him over to the boat?

A. I did.

Q. Who did you meet at the boat when you went there?

42 A. Mr. Thurlow, who was then the chief steward of the "City of Sidney."

Q. What occurred, if anything, on the boat, with respect to the property in the steward's department, between you and Mr. Thurlow and Mr. Schmidt?

A. The ship's equipment-book was up at the auditor's office at the time and so I had my copy in my office there and I took that over with me and I told Mr. Thurlow to turn the silver over to Mr. Schmidt and after checking it up to let me know, and I left the book there with them. (38)

Q. And then you went away?

A. I went back to the office; yes, sir.

Q. And that is all you know about that?

A. About that particular circumstance, yes.

Q. Before the ship sailed did Mr. Schmidt come to you to talk about any property in the steward's department?

A. I think later in the day, or the next morning, I saw him and I asked him how was the silver, and he said it was all right, that there were some spoons short, and I said the spoons were short from the last voyage and they were being repaired from the general stores, and he would get them with a receipt to sign before sailing.

Q. And do you know whether he got them or not?

A. He did, yes, sir.

Q. After that did you have any conversation with him concerning the stores in his department, before sailing?

43 A. Nothing more than just a general inquiry about — he found things, and what to do on the voyage and certain things to look after.

Q. Did he state whether or not he had gone over the matter and found the property that should be there in his department?

A. He stated to me that everything was all right, and I gave him this book to check up by.

Q. Mr. Schmidt was an old employee of the company for a long time in the Steward's department and in the Butcher department, was he?

A. Yes, sir.

Q. Upon his return from that voyage did you have any conversation with him concerning any of the property in the Steward's department?

A. Not until after they had taken stock and Mr. Muir, my assistant, reported to me that——

Q. (Intg.) You need not testify to that; I mean any conversation with Mr. Schmidt about it? (39)

A. No, sir; not until later.

Cross-examination.

Mr. Ryan:

Q. You do not know of your own knowledge whether Mr. Schmidt took an inventory of that property before he left on the voyage to Balboa, or not?

A. Nothing more than his word that everything was all right.

Q. He did not say that he took an inventory?

A. No, he did not use those words.

Q. You don't know whether he did or not?

44 A. No, sir.

Q. No one ever told you that he took an inventory?

A. He was left with instructions to take an inventory of the silver, and the book was left there with the two stewards.

Q. Was he supposed to take an inventory of all the silver in his department, the large silver and everything?

A. Yes, you do on all ships when you make a change.

Q. Is it usual for a man to do that when he is employed only two days before the vessel sails?

A. Certainly, if it is only one day.

Q. Is he not supposed to be working at other employment during that time?

A. He has other men doing the work around the ship; he only supervises.

Q. Is he not supposed to superintend that and see that it is done properly?

A. Not necessarily. The silver is a very important item.

Q. In other words, he has to go personally, when he is employed

as steward, and go over everything in his department and check it up with the equipment-book?

A. It is his duty to go over the silver, yes.

Q. How many articles in that equipment-book generally?

A. It is according to the size of the ship.

Q. There are many hundred items?

45 A. Yes, sir. (40)

Q. How long would it take a man to check over the items in that equipment-book?

A. You do not check the general stock, you only check the silver, if it is a short time that way.

Q. That is, including the large silver and the dishes, and so on?

A. Yes, sir.

Q. Do you know, of your own knowledge whether any of the large silver has ever been lost on a voyage before?

A. Well, I cannot recall.

Q. Do you remember distinctly that Mr. Schmidt told you it was all right?

A. Yes, sir.

Q. How do you happen to remember that so distinctly?

A. That is always a particular thing to look after, and I naturally wanted to know how it was coming out, and if there was any shortage to let me know, because we were transferring one ship to another.

Q. How many vessels come in here a week?

A. Well, we usually have two or three a week.

Q. And this vessel was gone three months, was it?

A. No, sir, about 62 or 63 days.

Q. A little over two months?

A. Yes, sir.

Q. And 24 vessels in the meantime would have come into this port, before this ship returned?

A. No, sir, we only have 16 vessels. There may be three in this week and only one in next week.

Q. At any rate, there were a number of vessels came in between the time this ship left for Balboa and the time when she re-

46 turned, and the stewards of all those vessels made reports to you regarding their silverware and other articles in the boat?

A. The silverware is checked up at the completion of the voyage.

Q. And each one of those checked up his articles with you, or made a report to you?

A. Yes, sir.

Q. Did you keep a written memorandum of what the amount was?

A. If there is any shortage it is charged to them and it is replaced. (41)

Q. But do you keep a written memorandum whether it is all right, or not?

A. We don't take their word for it; it is put out on the dining-room tables and counted piece by piece.

Q. Each steward that goes out tells you that his silverware is all right or not all right before he goes, does he?
A. Yes, sir.
Q. Approximately 15 or 20 of those stewards made such reports to you between the time this vessel left for Balboa and the time when she came back?
A. It is impossible to make any other report.

The Court:

Q. When they come back they count the silver out on the table?
A. Yes, sir.
Q. But before they go you take their word for it?
A. If they are not changed; it is in their possession all the time.
Q. In this case you took Mr. Schmidt's word for the presence of the silver on board?
A. He was responsible for it. He had orders to check in
47 with the old steward.

Mr. Ryan:

Q. Who is the head of the Commissary Department, the steward or the purser?
A. The purser.
Q. Why do you say then that the steward is responsible for it?
A. The steward is personally responsible for it; it is in his possession.

The Court:

Q. What do you mean by personally responsible?
A. It is in his possession; it is not in the possession of the purser.
Q. How far do you assume his responsibility goes, to what extent?
A. To make any shortage good.
Q. No matter what happens?
A. Well, I suppose it would not be in the case of a shipwreck. Any loss that takes place on the voyage the chief steward is responsible for.

Mr. Ryan:

Q. If $200 worth of silverware were lost you would expect that to be deducted from his wages? (42)
A. Well, his wages would amount to about that.

The Court:

Q. Then he is, in your judgment, and in the judgment of the company an insurer of the silver, for anything short of shipwreck?
A. It is a valuable article on the ship, and he is supposed to use all diligence in taking care of it; somebody has to be held responsible for it, otherwise it would be pilfered.

Mr. Ryan:

Q. Could it not be charged to profit and loss against the
48 company?
A. I could not state that.

Q. It is not really a company loss, in your judgment?
A. Well, it is a custom that prevails in all steamship companies.
Q. What is the usual amount that is lost?
A. Well, it varies.
Q. Is not this an unusually large amount?
A. It is an unusual amount.
Q. What is the usual amount?
A. I should judge five or $6.00.
Q. Just taken away by the passengers for souvenirs and the like?
A. Yes, for souvenirs, and for medicine, and one this- and another.
Q. How do you happen to remember so distinctly what Mr. Schmidt told you, and that you had these articles repaired, why do you remember this so carefully?
A. If you are skilled in that line you would remember a thing once in awhile. We don't change stewards only occasionally; we don't change stewards every trip.
Q. But they make inventories, do they, and report whether the silverware is all right?
A. According to the equipment-book, yes, sir.

49 [*Testimony of Alexander Muir, for Respondent.*]

ALEXANDER MUIR, called for the respondent, sworn.

Mr. Heggerty:

Q. What is your occupation?
A. Assistant to Mr. Veazie. (43)
Q. How long have you held that position?
A. Two years.
Q. Are you acquainted with Mr. Schmidt?
A. As chief steward.
Q. Sailing from San Francisco on the last round voyage of the "Sidney" on which she returned to this port, did you have anything to do with going over the equipment of the steward's department with Mr. Schmidt?
A. I did not.
Q. Did you upon his return from that voyage?
A. I did.
Q. That was in October, was it, or was it in September?
A. I believe so.
Q. Where was the ship lying at the time that you and Mr. Schmidt had something to do on board?
A. Pier 17, Folsom Street Dock.
Q. Will you state fully to the Court what you and Mr. Schmidt did with respect to the equipment of the steward's department?
A. The day after the arrival of a ship—on the day of arrival there is quite a lot to do in getting out the linen, we leave them that day and ask them the following day to put out the crockery, the glassware, the silver and the linen. I take the equipment-book and

go over the silver and count the articles with the chief steward. I draw his attention to any discrepancy if it is very large, as in this case, I say, "Try and dig them up, look around; we won't put in bills until to-morrow." Mr. Schmidt said, "All right, I will look around." He called me back in the afternoon and he said, "I found those." I said, "I am glad of it." He took me into the pantry and counted them out. I said, "Now take it all out again so as to make sure of it, and he said, "It is just as I left it." Still I found the five short.

Q. Those are the five large deep vegetable dishes?

A. Exactly.

Q. Did you furnish a memorandum of those to the chief steward?

A. The port steward. (44)

Q. I mean the port steward.

Mr. Ryan: We will admit that these articles were short when they returned from the voyage.

Mr. Heggerty: And about the values as stated.

Q. The values of these articles are the values stated on the memorandum, or about that?

A. That is correct.

Q. What further did Mr. Schmidt do then with respect to trying to find those articles?

A. Looked around the ship and he thought he had found them.

Q. But he did not find them?

A. No; it was a miscount on his part when I rechecked.

Q. How many of those dishes are there on the ship?

A. Twenty-five with covers; that would make 50. He gave me 45 pieces. Mr. Schmidt believed that he had them, because he said he had had quite a lot of trouble with his crew down the coast and he put it down to spite work.

Q. Did Mr. Schmidt say to you he did not have them going out?

A. No. He could not have said so when he said he found them; he must have acknowledged having them when he said he found them.

Q. Well, do you know anything more about the matter?

A. Nothing whatever.

Cross-examination.

Mr. Ryan:

Q. How many pieces of silver-ware are there in the Commissary department, other than the knives and forks and spoons?

A. Oh, I have 17 ships to take stock of, and I would not give it generally, I would not make any statement as to the number.

Q. You say there were 50 covered vegetable dishes?

A. Yes.

Q. There are also uncovered dishes?

A. Yes.

Q. And also large soup-tureens and vegetable dishes and cake-plates?

A. I gain that information because I have the equipment-book before me. (45)

Q. But generally there are several hundred large pieces of silverware on the vessel?

A. The ship is fully equipped.

Q. I say there are generally several hundred large pieces
52 of silverware on a vessel?

A. There is full equipment on each vessel.

Q. Mr. Schmidt did not say that he had those articles that were short, did he,—he merely said he would try to find them, did he not?

A. When he called me back he said he had them.

Q. I mean before that; when they were found short, did he tell you that he had had those articles on that voyage, or did he merely say he would try to find them?

A. No, he made no statement; he recognized they were short, presuming he had them when he left on board, otherwise he would not have got busy looking for them.

Q. After he looked for them, he thought he found them, but he did not remember the numbers—is that right?

A. He had a book there.

Q. Why did he say he found them?

A. I don't know why; he will answer you that. All I know is he said he found them.

Q. What did he actually find?

The Court: Five that he had seen before. He said they had counted and found 45, and that Mr. Schmidt said he had found the five missing ones and they counted them again and still found them to be 45. He testified to that before.

Mr. Ryan: That is all.

Mr. Heggerty: We introduce the articles issued from the Shipping Commissioner's office for that round voyage, and read the following:

53 [Excerpt from Shipping Articles.]

"And the said crew agree to conduct themselves in an orderly (46) faithful, honest and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of said Master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and to the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to said crew as wages the amounts against their names respectively expressed and to supply them with provisions according to the foregoing scale; and it is hereby agreed that any embezzlement or wilful or negligent destruction of any part of the vessel's cargo or stores shall be made good out of the wages of the person guilty of the same; and if any person enters himself as qualified for a duty which he proves himself incompetent to perform his wages shall be reduced in proportion to his incompetency."

Mr. Ryan: Mr. Heggerty, do you contend that this steward was incompetent, or that he was guilty of any wilful destruction or embezzlement?

Mr. Heggerty: We don't know how it was.

Mr. Ryan: But you don't contend that, do you?

Mr. Heggerty: Mr. Schmidt is not a thief or an embezzler.

Mr. Ryan: Those three are the only exceptions.

Mr. Heggerty: Yes.

54 The Court: The cause will be submitted, together with the exceptions.

[Endorsed:] Filed Nov. 22, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (47)

[EXHIBIT SHIPPING ARTICLES.]

[Title of Court and Cause.]

[*Copy of Log of S. S. "City of Sydney."*]

UNITED STATES OF AMERICA:

Articles of Agreement Between Master and Seamen in the Merchant Service of the United States.

Required by Act of Congress, Title LIII, Revised Statutes of the United States.

Office of the U. S. Shipping Commissioner for the Port of San Francisco.

Jul- 24, 1913.

It is agreed between the Master and seamen, or mariners, of the S. S. City of Sydney, of New York of which J. C. Follette is at present Master, or whoever shall go for Master, now bound from the Port of (1) San Francisco, to Ancon, Canal Zone, and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in San Francisco, the United States, for a term of time not exceeding 6 calendar months. (2) * * * (52)

And the said crew agree to conduct themselves in an orderly, faithful*ly*, honest, and sober manner, and to be at all times
55 diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any persons who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the same Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the fore-

going scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is (54) also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that (4) "And it is also agreed that the Master has the option to transfer any and all of the within mentioned persons, members of the crew, to any other American, British or other foreign vessel bound to San Francisco, California, in the same capacity or as a passenger and at the same rate of wages for final discharge any time during the period of time called for by these shipping articles."

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56 The authority of the Owner or Agent for the allotments mentioned within is in my possession—— Shipping Commissioner or Consular Officer. This is to be signed if such an authority has been produced, and to be scored across in ink if it has not.

[Matter enclosed between rules erased in copy.]

In Witness Whereof the said parties have subscribed their names on the other side or sides hereof on the days against their respective signatures mentioned. Signed by J. C. Follett, Master, on the day of Jul- 24, 1913.

		These columns to be filled up at the end of the voyage.		
Date of commencement of voyage.	Port at which voyage commenced.	Date of termination of voyage.		Port at which voyage terminated.
.....	.....	9–24 13		S. F.
			Date of deliery of lists to shipping commissioner.	
			9–25–13 (55)	

Signature of Seaman: 65 Ed. Schmidt.
Birthplace (After foreign birthplace insert * to indicate naturalized seamen): Germany.*
Age: 45.
Height: Feet, 5; inches, 5.
Description: Complexion, B.; Hair, B.
Wages per Month: 100.
Wages per Run:
Amounts of Monthly Allotment or Times of Payment:

Allotment Payable to:
Time of Service: M. —, D. —.
Whole Amount Due:
Wages Due:
Place and Time of Entry: San Francisco, Jul- 24, 1913.
Time at Which to be on Board: 7 A. M., July 24, 1913.
In What Capacity: Steward.
Shipping Commissioner's Signature or Initials: Deputy.
Conduct and Qualifications: V. G.
Address of Wife or Next Kin: (59)

57 *Certificate to Shipping Articles.*

(Art. 130, Customs Regulations of 1908.)

Department of Commerce and Labor, Bureau of Navigation,
Office of Collector of Customs.

Port of San Francisco, Jul- 24, 1913.

I Hereby Certify that these Shipping Articles are a true copy of the original this day produced to me in conformity with the provisions of Article 130 of Customs Regulations of 1908.

Given under my hand and seal of office this day of Jul- 24, 1913.

[SEAL] N. S. FARLEY,
Dep. Collector. (62)

Certificate as to Shipment of Seamen.

Department of Commerce and Labor, Bureau of Navigation, Shipping Service.

State of California, Port of San Francisco.

On this day of Jul- 24, 1913, personally appeared before me, a Shipping Commissioner in and for the said port, J. C. Follette Master S. S. City of Sydney, and the following named seamen: 1. J. C. Follette, and such others whose names appear opposite my signature, severally known to me to be the same persons who executed the instruments attached (shipping articles), who, each for himself, acknowledged to me that he has read or had heard read the same; that he was by me made acquainted with the conditions thereof, and
58 understood the same; and that, while sober, and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned.

[SEAL] LEIGHTON ROBINSON,
U. S. Shipping Commissioner. (63)
—— ——, *Deputy.*

[Title of Court and Cause.]

Opinion.

James W. Ryan, Proctor for Libelant.
Knight & Heggerty, Proctors for Respondent.

Libel for Wages of Seaman.

Libelant shipped as chief steward, on respondent's steamship "City of Sidney," in July for round-trip voyage from San Francisco to Balboa. The voyage ended in September, and on September 24th libelant received from the Shipping Commissioner all of his wages therefor.

The "City of Sidney" makes regular trips between these ports, and while in San Francisco, during the time this controversy arose, was engaged in discharging freight brought in, and loading freight for the next trip. It is the custom for the employees to remain on duty while in port unless they receive notice of discharge from such employment, and to sign Articles for the next trip on the day preceding the next sailing day. While in port they receive what is known as port pay, that is to say, their regular wages plus one dollar per day for victualing, as no meals are served on the vessel during her stay. Following this custom libelant, having received no notice of discharge, remained in the service of respondent while the
59 "City of Sidney" was (72) discharging and receiving freight for its next trip, from September 25th to October 1st, inclusive. Upon October 1st he was told that his services would not longer be required. Upon demanding his wages for this service in port he was informed that while his wages amounted to $30.33, he could not receive them, because of the loss of certain silverware entrusted to him as chief steward when he shipped in July and not accounted for by him at the end of the trip on September 24th, or thereafter, and amounting in value to $32.90, which sum respondent claimed the right to offset against his wages of $30.33, earned while in port. This setoff is pleaded as a defense and libelant interposed exceptions thereto on the ground that it did not arise out of the same contract as that upon which the suit was brought; that if entitled to offset this loss at all, respondent should have done so at the time the libelant received his wages on September 24th at the end of the voyage for which he shipped, and that the employment of libelant while in port was under a new contract beginning at the time he signed off at the end of the voyage.

The rule is well settled that in the admiralty court a setoff to be allowed must grow out of the same transaction as that which must be proven to support the libel. But it seems to me that as there was but one contract of hiring here, that is to say, the contract entered into in July when libelant shipped as chief steward, and as he would have to prove this contract in order to claim that he continued
60 in the employ of respondent after receiving his wages and signing off on September 24th, by reason of the custom before

mentioned, the matters set up are sufficiently connected with the contract upon which he relies to constitute, if sustained, a proper setoff, and for that reason the exceptions to the special defense are overruled. But I cannot agree with respondent's contention that under the facts of the case here the setoff should (73) be allowed. And this for at least two reasons. There is no proof in the first place that libelant ever received into his charge the articles mentioned. Libelant testifies that no inventory was made, and that he does not know whether the articles were on the vessel when he took charge or not. The only other testimony is that of the port steward who says that he told libelant when he put him in charge to make an inventory and check it up with the equipment book, and that he later asked him how he found things to which he replied: Everything is all right." This is not sufficient to establish the receipt of the articles by libelant. The other serious reason militating against the allowance of the setoff claimed is that it would make the chief steward under an ordinary contract of employment an insurer of all articles entrusted to him. There is no suggestion or proof here of negligence, and I am not prepared to concede that even were it clearly shown that the articles were entrusted to the libelant, the mere fact that they were not on the vessel after a two months' voyage would render him responsible for their loss. Nor do I believe that such a claim, where respondent did not check up the articles entrusted to
61 the libelant before the voyage, and offered no suggestion or proof of negligence on his part, but undertook to hold him to the responsibility of an insurer, furnishes the sufficient cause required by Section 4529 to relieve respondent from the penalties in that section provided.

A decree will, therefore, be entered for libellant as prayed for.

October 29th, 1913.

M. T. DOOLING, *Judge.*

[Endorsed:] Filed Oct. 29, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (74)

[Title of Court and Cause.]

Final Decree Overruling Exceptions of Libelant to Answer and Granting Libelant Relief as Prayed for in Libel.

At a Stated Term of the District Court of the United States of America, in and for the Northern District of California, Held at the City and County of San Francisco, in said District, in the courtroom of said Court in the United States Court-house and Postoffice Building, on Wednesday, the 29th Day of October, Nineteen Hundred and Thirteen.

Present: The Honorable Maurice T. Dooling, United States District Judge.

This cause having come on regularly to be heard by the Court upon the libel of libelant herein, and the answer thereto of the re-

spondent Pacific Mail Steamship Company, a corporation, and
62 the exceptions of libelant to said answer; and James W. Ryan, Esquire, proctor and advocate for libelant, and Charles J. Heggerty, Esquire, proctor and advocate for respondent, having been heard on the issues raised by said exceptions; and the said exceptions having been submitted to the Court for its determination;

And the Court having thereupon heard the testimony and proofs of the respective parties, the cause having been tried on its merits; and the said proctors and advocates having been heard on (75) the issues raised by said libel, answer, testimony and proofs; and the said cause having been submitted to the Court for its determination;

And due deliberation having been had, and the Court having rendered and filed herein its opinion in writing, wherein and whereby it finds that the exceptions of libelant to said answer are not well-founded; and wherein and whereby it finds that all the allegations of the libel herein are true, and that the proofs introduced by respondent to support the special defense or setoff set forth in the answer herein are insufficient as a defense to said libel;

And the Court having ordered that a decree be made and entered herein overruling the exceptions of libelant to said answer;

And the Court having further ordered that a decree be made and entered herein in favor of libelant and against the respondent as prayed for in said libel;

Now, therefore, by reason of the premises, it is hereby
63 ordered adjudged, and decreed, that the exceptions of libelant to said answer be overruled;

And it is further ordered, adjudged and decreed, that the said libelant, Ed. Schmidt, do have and recover from the respondent Pacific Mail Steamship Company, a corporation, the sum of one hundred and fifty-one and 59/100 dollars ($151.59), with legal interest thereon from the date hereof, with libelant's costs of suit, taxed at thirty-six and 25/100 dollars ($36.25);

And it is further ordered, adjudged, and decreed, that the said sums may be paid to James W. Ryan, Esquire, proctor for libelant, and that said proctor may enter complete satisfaction of this decree upon payment to him of the said sums hereinbefore specified: (76)

And it is further ordered, adjudged, and decreed, that, unless this decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this Court, the libelant have execution against respondent, Pacific Mail Steamship Company, a corporation, to enforce satisfaction of this decree, or of so much thereof as shall remain unsettled.

Dated November 5th, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed:] Filed Nov. 5, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (77)

64 [Title of Court and Cause.]

Proctor's Fee and Cost Bill.

Proctor's fee	$20.00
Clerk's costs	16.10
Marshal's fee for serving citation	2.00
Commissioner's fee for certifying to verification of libel	.25
Total	$38.35

JAMES W. RYAN,
Proctor for Libelant.

The above fee and cost bill is correct, and respondent hereby agrees to its taxation in the amount above stated.

KNIGHT & HEGGERTY,
Proctors for Respondent.

The costs in the above-entitled cause are hereby taxed in the sum of thirty-eight and 35/100 dollars ($38.35).

W. B. MALING, *Clerk.*
C. W. CALBREATH,
Deputy Clerk U. S. District Court
Northern District of California.

[Endorsed:] Filed Nov. 5, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (78)

65 [Title of Court and Cause.]

Notice of Appeal.

To Honorable Walter B. Maling, Clerk of the United States District Court, to Ed Schmidt, Libellant in the Above-entitled Cause, and to James W. Ryan, Esquire, Proctor for the Libellant:

You are and each of you are hereby notified that the Pacific Mail Steamship Company, the respondent in the above-entitled cause, intends to and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree of the District Court of the United States for the Northern District of California, First Division, made and entered in said cause on November 5th, 1913, and from each and every part thereof, and from the whole of said Decree; and you are hereby further notified that the said Respondent intends to introduce new proofs in said Appeal.

Dated San Francisco, November 14th, 1913.

KNIGHT & HEGGERTY,
Proctors for the Respondent. (79)

Receipt of a copy of the within Notice of Appeal is hereby admitted this 14th day of November, 1913.

JAMES W. RYAN,
Proctor for Libellant.

[Endorsed:] Filed Nov. 14, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. (80)

66 [Title of Court and Cause.]

Assignments of Error.

Now comes the Pacific Mail Steamship Company, respondent in the above-entitled cause, and assigns the following errors of the above-named Court in said cause, to wit:

1. The Court erred in finding in the Final Decree and in its Opinion, and in finding at all that all of the allegations of the Libel are true; and in finding that the allegations of Article I of the Libel are true; and in finding that the allegations of Article II of the Libel are true.

2. The Court erred in finding and adjudging that in September, 1913, Libellant was hired at the port of San Francisco, or at all, to serve as chief steward on board the "City of Sydney," for part of a voyage from the port of Balboa to the port of San Francisco, and for a part of a voyage from the port of San Francisco to the port of Balboa, at $100 per month wages and $1 per day allowance for victualling money, and in finding and adjudging that in pursuance of such or any such agreement libellant entered the service of Respondent as chief steward on board said "City of Sydney" in the forenoon of September 25, 1913, or at (81) any other time or at all.

3. The Court erred in finding that said "City of Sydney" having taken libellant on as chief steward, discharged her cargo, and made freight and completed her voyage from Balboa to San Francisco; and immediately or at all began taking and continued to
67 take on board a cargo for a voyage from San Francisco to Balboa with libellant on board as chief steward.

4. The Court erred in finding and adjudging that libellant, at any time after said "City of Sydney" returned from her round voyage to Balboa and tied up at her dock in San Francisco with libellant on board as chief steward under the Shipping Articles for said round voyage and was paid off and discharged under said Articles as such chief steward ever was chief steward or hired — employed as chief steward on said vessel or was a seaman on said vessel or a member of any crew or the crew of said vessel or that said vessel had any crew of which libellant was a member or any part.

5. The Court erred in finding and adjudging that on the evening of October 1, 1913, or *at* ever at all, respondent without any cause or at all turned libellant on shore and would not permit him to perform any part of the remainder of said voyage, and that there was any remainder of any voyage upon which libellant was hired or had

served as chief steward or as a seaman or as a member of the crew or a crew of said vessel.

6. That the Court erred in finding and adjudging that the round voyage of said vessel did not terminate on September 24, 1913, and that any voyage had commenced or that there was any other voyage of said vessel commenced until after October 1, 1913, and until after libellant was discharged from the service of respondent on October 1, 1913.

68 7. The Court erred in finding and adjudging that libellant was during the period of time from and including (82) September 25, 1913, to and including October 1, 1913, a seaman upon or a member of the or any crew of said "City of Sydney," or employed or hired as a seaman or as a member of the crew or a crew or as chief steward of said vessel, upon or for any voyage or part of any voyage or at all, and in finding and adjudging that libellant rendered any service as a seaman or earned seaman's wages, or was entitled to or earned or should be paid any seaman's wages or any wages as a seaman.

8. The Court erred in finding and adjudging that there was due and unpaid to libellant any seaman's wages or any wages as a seaman or that he earned any wages as a seaman for the services rendered by libellant to respondent after September 24th, 1913, and after he was paid off and discharged as chief steward under the shipping articles on the round voyage terminating at the port of San Francisco on September 24, 1913; and in finding and adjudging that libellant was ever employed or hired as a seaman on or to perform services on, or that he did serve or perform services on said vessel as a seaman or earn seaman's wages upon said vessel after he was paid off and discharged under said shipping articles.

9. The Court erred in finding and adjudging that during the whole time libellant was on board said vessel he well and faithfully performed his duty as such chief steward, or became entitled to demand on the evening of the 1st of October, 1913, ¼ of his

69 wages or of the wages earned by him over and above all just deductions, or to the balance thereof on the evening of October 5, 1913.

10. The Court erred in finding and adjudging that said cause or the hiring or employment or discharge of libellant or the services or pay for the services performed by libellant after said vessel terminated her round voyage and he was paid off and discharged under the shipping articles, was or were within the (83) admiralty and maritime jurisdiction of the United States and of said District Court.

11. The Court erred in finding that libellant was entitled to and in ordering that a Decree be made and entered in favor of libellant and against respondent as prayed for in the libel.

12. The Court erred in finding, ordering, adjudging and decreeing that the libellant have and recover from respondent $151.59, with legal interest thereon from date of said Decree, and his costs taxed at $36.25.

13. The Court erred in finding and adjudging that libellant was not liable for the value or *of* to turn over and deliver to respondent

at the termination of the said round voyage on September 24, 1913, the several articles of personal property enumerated and described in the answer of respondent, and that the value of such articles should not be and that respondent was not entitled to set off the value of such articles against the wages earned by libellant while on shore duty and while said vessel was tied up to her dock and after said
70 round voyage on which he had signed shipping articles had terminated and he had been paid off and discharged as chief steward under said articles; and in finding and adjudging that the reason for not paying libellant his wages from September 24th to October 2d, 1913, and the claim of respondent that libellant should deliver said articles to it or make good or pay the value of the same and that respondent was entitled to offset against the wages earned by him after said voyage and while he was on shore pay and duty and said vessel was in port, the value of said articles, did not furnish or constitute the sufficient cause required by Section 4529, Revised Statutes, to relieve respondent from the penalties in that section provided; and in finding and adjudging that respondent or said (84) vessel was making any coasting or any voyage during the time and during the period of time that said libellant was rendering to or performing services for respondent after he had been paid off and discharged on the termination of said round voyage; and in finding and adjudging that the evidence was not sufficient to establish the receipt of said articles by libellant, and that there was no proof that libellant ever received these articles into his charge and that libellant did not know whether said articles were on the vessel when he took charge or not, and that no inventory was made, and that there was no suggestion or proof of negligence of libellant; and that libellant would not be responsible for the loss of said articles even if it were clearly shown that they were entrusted to him, and that
71 libellant was not liable as an insurer; and that the set off should not be allowed and was not sustained by the proof.

14. The Court erred in finding and adjudging that there was but one contract of hiring between the libellant and respondent and that that contract and that hiring was the contract entered into in July, 1913, when libellant shipped as chief steward; and in finding and adjudging that respondent was liable to pay to libellant and that libellant earned and was entitled to receive and be paid seaman's wages and wages as a seaman under said shipping articles upon which he had been paid off and discharged, and when he had not signed or shipped for any other voyage under any other or new shipping articles; and the Court erred in not finding and adjudging that respondent was entitled to offset the value of said articles against libellant.

15. The Court erred in finding and adjudging that the libellant or the respondent or the cause of libellant by reason of or because of his said services after having been paid off and discharged under and from said articles, or in respect of said (85) wages or his wages therefor, was under or included within or governed or affected by said section 4529 Revised Statutes, or that the provisions thereof applied to or governed libellant or his services or his wages or the respondent in relation to the services and wages or payment for the

services of libellant between September 24, 1913, and October 2, 1913.

16. The Court erred in holding, finding and adjudging that said section 4529, Revised Statutes, applies to or governs or affects
72 the respondent under the facts of this cause, or to the facts of this cause, or to the libellant or his said services or wages while said vessel is in port and libellant on shore pay and shore duty.

17. The Court erred in finding and adjudging that libellant was entitled to have and recover from respondent the sum of $151.59, and costs.

18. The Court erred in not dismissing said cause and awarding costs to the respondent.

19. The Court erred in retaining jurisdiction of said cause, and in finding and adjudging that the same was within the admiralty and maritime jurisdiction of this Court, and that libellant was a seaman on said vessel and that his said wages were seaman's wages.

Wherefore, and by reason of the foregoing errors, the respondent prays that said Decree be reversed and corrected, that said action be dismissed, and that respondent recover its costs and for such other order and relief as may be conformable to justice.

Dated: San Francisco, November 17th, 1913.

KNIGHT & HEGGERTY,
Proctors for the Above-named Respondent, the Pacific Mail Steamship Company. (86)

Due service and receipt of a copy of the within Assignments of Error is hereby admitted this 18th day of November, 1913.

JAMES W. RYAN.
Proctor for Libellant.

[Endorsed:] Filed Nov. 18, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. (87)

73 [Title of Court and Cause.]

Citation on Appeal (Copy).

UNITED STATES OF AMERICA,
Ninth Circuit,
Northern District of California, ss:

The President of the United States to Ed Schmidt, Libellant Above Named, and to James W. Ryan, Esq., His Proctor, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, State of California, within thirty (30) days from and after the day this Citation bears date, pursuant to an Appeal filed in the office of the clerk of the United States District Court for the Northern District of California, in the above-entitled cause, wherein the Pacific Mail Steamship

Company is appellant and you are libellant and appellee, to show cause, if any there be, why the Decree made, entered and rendered in the above-entitled cause on the 5th day of November, 1913, against the Pacific Mail Steamship Company said respondent, as in said appeal mentioned, (88) and thereby appealed from, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of
74 the Supreme Court of the United States, this 15 day of November, 1913.

M. T. DOOLING,
Judge of the United States District Court for the Northern District of California.

Attest:
W. B. MALING, *Clerk.*
C. W. CALBREATH,
Deputy Clerk of said District Court.

Service and receipt of a copy of the within Citation is hereby admitted this 15th day of November, 1913.

JAMES W. RYAN,
Proctor for Libellant and Appellee.

[Endorsed:] Filed Nov. 15, 1913. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk. (89)

Certificate of Clerk U. S. District Court to Apostles.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed pages, numbered from 1 to 89, inclusive, contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled Ed. Schmidt, Libelant, vs. The Pacific Mail Steamship Company, Respondent, numbered 15,483, and which said Transcript of Appeal is made up pursuant to, and in accordance with "Præcipe for Apostles on Appeal" (copy of which is embodied in said Transcript), and the instructions of Messrs. Knight and Heggerty, Proctors for Respondent and Appellant.

75 I further certify that the cost of preparing and certifying the foregoing Transcript of Appeals is the sum of Forty-five Dollars and Seventy Cents ($45.70), and that the said sum has been paid to me, by proctors for appellants herein.

I further certify that the original Citation on Appeal issued in the above-entitled cause is hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of the said District Court, this 20th day of December A. D. 1913.

[SEAL]

W. B. MALING, *Clerk,*
By LYLE S. MORRIS,
Deputy Clerk. (90)

[Title of Court and Cause.]

Citation on Appeal (Original).

UNITED STATES OF AMERICA,
Ninth Circuit,
Northern District of California, ss:

The President of the United States to Ed Schmidt, Libellant Above Named, and to James W. Ryan, Esq., His Proctor, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty (30) days from and after the day this Citation bears date, pursuant to an Appeal filed in the office of the
76 Clerk of the United States District Court for the Northern District of California, in the above-entitled cause, wherein the Pacific Mail Steamship Company is appellant, and you are libellant and appellee, to show cause, if any there be, why the Decree made, entered and rendered in the above-entitled (91) cause on the 5th day of November, 1913, against the Pacific Mail Steamship Company, said respondent, as in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15 day of November, 1913.

M. T. DOOLING,
Judge of the United States District Court for the Northern District of California.

Attest:
W. B. MALING, *Clerk,*
By C. W. CALBREATH,
Deputy Clerk of said District Court. (92)

Service and receipt of a copy of the within Citation is hereby admitted this 15th day of November, 1913.

JAMES W. RYAN,
Proctor for Libellant and Appellee.

[Endorsed]: No. 15,483. District Court of the United States, Northern District of California. In Admiralty. Ed Schmidt, Libellant, vs. Pacific Mail Steamship Company, Respondent. Citation. Filed Nov. 15, 1913. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk. (94)

77 [Endorsed]: No. 2352. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Mail Steamship Company, a Corporation, Appellant, vs. Ed. Schmidt, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

Received and filed December 20, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[*Order Extending Time to December 22, 1913, to File Transcript of Apostles in Appellate Court.*]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. —.

PACIFIC MAIL STEAMSHIP COMPANY, Respondent and Appellant,
vs.
ED. SCHMIDT, Libelant and Appellee.

Upon motion of Chas. J. Heggerty, Esquire, proctor for respondent and appellant herein, and in view of the written consent hereinafter set forth of James W. Ryan, Esquire, proctor for libelant and appellee, it appearing that the appellant herein desires further time in which to file the Transcript of Appeal in the above-entitled matter, in the above-entitled court.

78 It is hereby ordered that said appellant have to and including the 22d day of December, A. D. 1913, in which to file in the above-entitled court the Transcript of Appeal in the above-entitled matter.

M. T. DOOLING, *Judge.*

Dated December 15th, 1913.

I hereby consent that the time in which the appellant may file Transcript of Appeal in the above-entitled matter may be extended as set forth in the above order.

JAMES W. RYAN,
Proctor for Libelant and Appellee.

[Endorsed]: No. 2352. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 22, 1913, to File Record thereof and to docket case. Filed Dec. 16, 1913. F. D. Monckton, Clerk. Refiled Dec. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

No. —.

ED. SCHMIDT, Libellant,
vs.
PACIFIC MAIL STEAMSHIP COMPANY, Respondent.

79 *Stipulation and Order for Omission of Certain Portions of the Record from the Printed Apostles.*

It is hereby stipulated and agreed by and between the respective parties hereto that the Clerk of the above-entitled court when printing the Apostles on Appeal herein shall only print and include in the printed Apostles the following portions of the Shipping Articles, viz:

1. Commencing with the words "United States of America," on line 12, page 52, down to and including the words "months," on line 26, page 52.

2. Commencing with the word "And" line 16, page 54, down to and including the figures "9-25-13," line 31, page 55.

3. Commencing with the words "Signature of Seaman," line 1, page 59, down to but not including the figures "66," line 5, page 59.

4. Commencing with the words "Certificate to Shipping Articles," line 1, page 62, down to and including the word "Deputy" line 17, page 63.

5. And that all of the remainder of the Shipping Articles shall be omitted from the printed Apostles.

It is further stipulated and agreed by and between the respective parties hereto that the clerk of the above-entitled court when printing the Apostles on Appeal herein may omit from the printed Apostles the title of court and cause wherever the same appear in the record except the title of the court and cause of the Libel.

80 Dated December 22d, 1913.

KNIGHT & HEGGERTY,
Proctors for Appellant.
JAMES W. RYAN,
Proctor for Appellee.

It appearing that the above-mentioned portions of the Shipping Articles contained in the record are the only portions thereof material to be considered by the Court and that the remainder of the Shipping Articles contained in the record is immaterial to the Hearing of the Appeal,—

It is ordered that the record be filed by the Clerk as received, and the provisions of Rule 15 be relaxed accordingly.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 2352. Circuit Court of Appeals of the United States, Ninth Circuit. Ed Schmidt, Libellant, vs. Pacific Mail Steamship Company, Respondent. Stipulation for Omission of Portions of Record from Apostles. Filed Dec. 22, 1913. F. D. Monckton, Clerk.

81 & 82 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

83 At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Friday, the Sixth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable William B. Gilbert, Circuit Judge, Presiding; Honorable Erskine M. Ross, Circuit Judge; Honorable Frank S. Dietrich, District Judge.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Order of Submission.

Upon consent of Messrs. Charles J. Heggerty, counsel for the appellant, and James W. Ryan, counsel for the appellee, ordered, appeal in the above-entitled cause submitted to the Court for consideration and decision on the briefs on file.

At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Eighteenth
84 Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable William B. Gilbert, Circuit Judge, Presiding; Honorable Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolverton, District Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees of This Court.

Ordered, that each of the opinions this day rendered by the Court in the following entitled causes be filed by the clerk, and that a Judgment or Decree in each cause be filed and recorded in the Minutes in accordance with the opinion filed therein:

* * * Pacific Mail Steamship Company, a Corporation, Appellant, vs. Ed. Schmidt, Appellee. No. 2352. * * *

Further ordered, That the Dissenting Opinion of the Honorable Frank S. Dietrich, United States District Judge, in the cause entitled Pacific Mail Steamship Company, a Corporation, Appellant, vs. Ed. Schmidt, Appellee, No. 2352, be filed by the clerk. * * *

85 [*Opinion U. S. Circuit Court of Appeals.*]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

Before Gilbert and Ross, Circuit Judges, and Dietrich, District Judge.

Ross, *Circuit Judge:*

The appellee shipped as steward, at the wages of one hundred dollars a month, on board the steamship "City of Sydney," the home port of which was New York, under shipping articles of date July 24, 1913, signed on behalf of the respective parties, then "bound from the port of (1) San Francisco to Ancon, Canal Zone, and such other ports and places in any part of the world as the master may direct, and back to the final port of discharge in San Francisco, the United States, for a term of time not exceeding 6 calendar months." Among the terms specified in the articles were the following:

"And it is hereby agreed that any embezzlement or wilful
86 or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. * * * And it is also agreed that the master has the option to transfer any and all of the within mentioned persons, members of the crew, to any other American, British, or other foreign vessel bound to San Francisco, California, in the same capacity or as a passenger and at the same rate of wages for final discharge any time during the period of time called for by these shipping articles."

The case shows that the ship left San Francisco on the 24th of July, 1913, for Balboa, returning to San Francisco on the 23d day of the following September, and that on the next day, September 24th, the appellee received from the Shipping Commissioner all of his wages for that round trip—the ship then being tied up at the wharf discharging her cargo. What the appellee did during that time and what is referred to by the trial judge and by counsel as the custom then prevailing at the port of San Francisco, is thus stated by the appellee in his testimony, of which we find no contradiction in the other evidence:

"Q. What was the procedure after you returned from the voyage regarding receiving your money?

"A. I got paid off by the Shipping Commissioner, my wages due to me for that voyage.

"Q. Why did you remain on board the ship?

"A. I was still chief steward on the boat and not notified I had been discharged for anything and I worked on board as chief steward.

"Q. What are the duties of the chief steward on the
87 steamer?

"A. During the voyage?

"Q. Yes, during the voyage.

"A. He is simply the head of the Commissary Department, keeps the rooms clean and look- after the passengers and so on.

"Q. What else?

"A. To look after his help and see that the work is done.

"Q. What does the chief steward do?

"The Court:

"Q. You have charge of the rooms of the passengers, have you?

"A. Yes, sir.

"Mr. Ryan:

"Q. What does the chief steward do after he arrives in port?

"A. After he arrives here we clean the ship.

"Q. You mean you superintend it?

"A. Yes, and see that the stores are put on board for the next voyage, get the ship ready for sea for the next voyage.

"Q. Is your work while in port very similar to that while on the voyage?

"A. Yes.

"Q. What is the difference between your duties while on the voyage and while the ship is in port?

"A. The difference is we have no passengers on board, while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage.

"Q. When are the supplies ordered and who orders them?

"A. I put in a requisition for supplies and deliver the requisition-book to the port steward.

"Q. Who places those provisions on board?

88 "A. The chief steward—he sees that it is put on board.

"Q. How many men are employed under you while the vessel is on the voyage?

"A. The steward's department, or what they call the commissary department in that company, has 22.

"Q. That includes the title of what positions?

"A. The steward, the steerage cooks and bakers, butchers, cooks, waiters.

"Q. How long after the ship arrives at the dock do the seamen go before the Shipping Commissioner and receive their wages?

"A. Generally it is the day after.

"Q. And how long before the vessel leaves the dock do the seamen go before the Shipping Commissioner and sign new articles?

"A. One day before leaving on that voyage."

The evidence is that the appellee was allowed one dollar a day for his meals while in port as no cooking was done on board during the time, and that such was the custom at the port of San Francisco.

The day before the ship was to sail on its next voyage the appellee was discharged, at which time there was due him for his wages and meals while in port $30.33, the amount of which was not questioned but when he demanded it on the 1st day of October, 1913, the appellant steamship company refused to pay it on the contention that certain silverware, which the company claimed was entrusted to him as chief steward when he shipped in July, was not accounted for by him at the end of the trip or thereafter, amounting in

89 value to $32.90, which sum the company claimed the right to offset against his wages of $30.33 earned while in port; and this set-off it pleaded as a defense to the appellee's libel for his wages, which libel also contained a demand against the steamship company for one day's pay for every day his wages were unpaid after October 1st, 1913, as a penalty under and by virtue of Section 4529 of the Revised Statutes as amended by the Act of December 21, 1898 (30 St. L., p. 756), for which penalty, together with the wages due, the Court below awarded the libelant a decree. The section of the Revised Statutes, as so amended, is as follows:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after

the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim
90 made before the Court; but this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

It is contended on the part of the appellant company that the case is not within the admiralty and maritime jurisdiction of the court, for the reason that the service of the appellee while the ship was at the port of San Francisco was not a maritime service. There is nothing in the decision of the case of California-Atlantic S. S. Co. vs. Central Door & Lumber Co., 206 Fed. 5, to justify the contention, nor is there in the case of The Sirius, 65 Fed. 226. In the latter case the keeper of a vessel in her home port and then out of commission filed a libel against her for his services, and the Court said, among other things:

"The libelant, we have seen, rendered the service of a ship-keeper in the home port of the vessel. He was hired particularly to take care of the engine and boilers, and also to look after the vessel in general. In this he was assisted by a deck watchman. How his duties, assuming them to have been efficiently rendered, contributed to the navigation of the "Sirius," it is difficult to see. The vessel was not then engaged in navigation. She could not do so, being out of commission. She was laid up, without cargo, or even master and crew. Giving the libelant's claim the most favorable consideration, it can only be said that his services tendered to the preservation of the vessel, so that when she should be enrolled as an American vessel she might be fitted out for a voyage less expensively
91 and more expeditiously. But such service did not contribute to the navigation of the vessel. Merely keeping a vessel in safe custody, protecting it from the depredations of thieves or the danger of fire, or preserving her machinery from unnecessary decay and deterioration, does not, of itself, constitute a maritime service. It must be connected with the navigation of the vessel. It is difficult to see, therefore, upon what ground it can be said that the libelant rendered a service of a maritime nature. His services did not contribute to the present navigation of the vessel, because she was then laid up; nor to her prospective navigation, because she had no voyage in contemplation. To be sure, it concerned the vessel, but it did not concern the vessel with reference to her navigation, present or prospective. Looking at the question in the light of the authorities, we find that, although there has been, and is yet, some conflict as to whether a mere ship-keeper or watchman can be deemed to have rendered a maritime service, the weight of authority is against the right of individuals performing such services to a vessel

in her home port to recover in a court of admiralty, for the reason that it is not regarded as a maritime service within the signification of that term. But the cases, while establishing the general rule, have also created exceptions which, if given full latitude, may become almost as wide as the rule itself. The reason for the exceptions is that, if the ship-keeper or watchman, in connection with his duty as such, render any distinctively maritime service, such as moving the vessel to a different anchorage, or preparing or
92 fitting her out for a voyage, or in brief any service connected with the navigation or voyage of the vessel, then the court of admiralty will not only take cognizance of the maritime service rendered, but, if it be sufficiently broad and pronounced, will treat the entire service as maritime."

In the present case the vessel was in active service, the present libelant a regular seaman under shipping articles, whose term of service had not expired, and who, while the ship was discharging her cargo preparatory to another voyage, was cleaning ship, storing supplies therein, and otherwise performing the duties pertaining to his position of steward.

In the case of Leathers vs. Blessing, 105 U. S. 626, which was an action of tort, the Supreme Court held that the jurisdiction in admiralty is not ousted by the fact that when the wrong was done on the vessel by the negligence of her master she had completed her voyage and was securely moored at the wharf, where her cargo was about to be discharged, the Court saying (page 628), among other things:

"The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the District Court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the Circuit Court did not find that the libelant was an officer, seaman, passenger, or freighter, or that he had any connection with the vessel or any business upon her or about her, except that when he went on board of her he was expecting a consignment of cotton-seed by her, and went on board to ascertain whether it had
93 arrived; and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence was at the time in control of a vessel which had been previously engaged in navigating water within the jurisdiction of the admiralty courts of the United States, cannot give jurisdiction to such courts. Although a suit might have been brought in a common-law court for the cause of action sued on here, the District Court, sitting in admiralty, had jurisdiction of this suit. The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she

was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf, and had communication with the shore by a gang-plank, did not make her a part of the land or deprive her of the character of a water-borne vessel."

In the case of The Steamship Jefferson, 215 U. S. 130, which was a case of salvage, and where the jurisdiction of the court was challenged on the ground that at the time the services sued for were rendered the ship "was in a drydock undergoing repairs, was
94 not on the sea, but was virtually on the shore, and was consequently at such time not an instrumentality of navigation, subject to the dangers and hazards of the sea," the Supreme Court said, among other things:

"By necessary implication it appears from the averments of the libel that the steamship before being docked had been engaged in navigation, was dedicated to the purpose of transportation and commerce, and had been placed in the drydock to undergo repairs to fit her to continue in such navigation and commerce. As said in Cope vs. Dry Dock Co., 119 U. S. 625, 627, 'A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service.' In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a drydock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land. Clearly in the case last supposed the vessel would not cease to be a subject within the admiralty jurisdiction merely because for a short period by the operation of nature's laws, water did not flow about her. Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the
95 loading and unloading of vessels at abutting quays, and the drydock into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because in the one case the water is confined within the dock by means of gates closed when the tide begins to ebb, while in other the water is removed and the gates are closed to prevent the inflow of the water during the work of repair. It was long ago recognized by this Court that a service rendered in making repairs to a ship or vessel, whether in or out of the water, was a maritime service. Peyroux vs. Howard, 7 Pet. 324. But we need not further pursue the subject, since the error of the contention that a vessel, merely because it is in a drydock, ceases to be within the admiralty jurisdiction, was quite recently established in The Robert W. Parsons, 191 U. S. 17. In dis-

posing of the proposition we are now considering it was further said (p. 33):

"'A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was in fact performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in drydock are made upon land. We are unwilling to admit this proposition. * * * A drydock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All
96 injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a drydock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. * * * But as all serious repairs upon the hulls of vessels are made in drydock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exists.'"

It seems to be now settled that the services of stevedores in loading or unloading a vessel are maritime in character, which is, of course, based upon the theory that the voyage of the vessel does not end in the one case until the cargo has been discharged, and, in the other, that the voyage commences at the time the vessel begins to receive cargo. 1 Cyc. of Law and Procedure, p. 833, and note to the case of Baltimore Steam Packet Co. vs. Patterson, 66 L. R. A. 293, and numerous cases there cited. That the appellee was a seaman of the "City of Sydney" in rendering the services in question, and as such within the admiralty jurisdiction, we regard as clear. Section 4612 of the Revised Statutes expressly provides, among other things, that:

"In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to
97 serve in any capacity on board the same shall be deemed and taken to be a 'seaman.'"

But regardless of the statute, we think that under the general maritime law the present libelant was a seaman, and as such entitled to sue in admiralty.

In Benedict's Admiralty, 4th ed., sec. 189, it is said:

"The term 'mariner' includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage. Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deckhands, waiters—women as well as men—are mariners."

In the case of The Queen vs. The Judge of the City of London Court and the Owners of the S. S. "Michigan," 25 Law Reports, Q. B. D. 339, the ship having arrived at the port of London, which

was her destination, her crew, including the mate, were paid off. The mate after being so paid, and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After the inward cargo had been discharged and a portion of the outward cargo had been shipped on board, the ship was taken into dock for repairs, and the mate continued on board by the owner's direction to superintend the execution of such repairs. The question was whether the services so rendered by the mate were maritime services, and the Judges thus disposed of the question:

98 "Lord Coleridge, C. J.—We have had an opportunity of consulting the learned Judge of the admiralty court, who has had a large experience in these matters, and although my own impression was at first the other way, I defer to his authority, and come to the conclusion that the County Court Judge was wrong, and that an action in rem will lie at the suit of a person in the position of the present plaintiff. To allow of that remedy in such cases as this has, it appears, been the practice of the admiralty court. I find that we are not embarrassed with the consequences which I was afraid would follow if our decision proceeded upon the definition of the term 'seaman' in the Merchant Shipping Act—a definition which would undoubtedly include such a person as a stevedore. For the question here does not depend in any way upon the Merchant Shipping Act, inasmuch as the Act of Parliament giving admiralty jurisdiction to County Courts does not incorporate that act. The action ought to be heard. The rule must, therefore, be made absolute.

"Wills, J.—I am of the same opinion. I have had the opportunity, not only of speaking to my brother Butt upon the subject, but also of looking into the question for myself, and, upon consideration of the authorities, I have independently arrived at the same conclusion. The case seems to me to be practically governed by the case of The Jane and Matilda (1), where Lord Stowell held that the woman who had acted as caretaker was entitled to claim against the ship—a decision which, so far as I can make out, seems to be entirely in accordance with the uniform current of authority.

99 The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbor just as much as to services rendered by them at sea. It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbor at the time."

In the subsequent case of Corbett vs. Pearce, 2 K. B. D. (1904) the Court said (p. 427):

"What is usually understood by the term 'seaman' in its ordinary

acceptation? It seems to me that a correct definition was given in the case, to which we have been referred, of Reg. vs. City of London Court, where it was held that a person whose ordinary duties led him to take part in the navigation of a seagoing ship was entitled to a remedy against the ship for his wages, although the services rendered by him consisted in superintending repairs to the ship while in port. It was there said: 'The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation or of transport of cargo from one place to another, and services rendered by such persons in harbor just as
100 much to services rendered by them at sea.' That description of the persons who may popularly be called seamen is very applicable to the present case."

The trial court in the instant case was, in our opinion, right in holding that the set-off pleaded in defense of the libel was not sustained by the evidence. There is nothing tending to show any bad faith on the part of the steward, or even tending to show any negligence or lack of care on his part in the performance of his duties, nor was there, as said by the trial Judge, sufficient evidence of the alleged missing articles ever having been delivered into his keeping. On the contrary, the appellant's San Francisco port steward testified that it was usual on voyages for a small amount of the silverware of the ship to be taken by the passengers "for souvenirs, and for medicine, and for one thing and another"; usually five or six dollars' worth, said the witness. In the present case the amount claimed to have been lost was, as has been said, of the value of $32.90.

We are of the opinion that no sufficient cause was shown for the refusal of the appellant to pay the libelant his wages upon his discharge from service.

The only remaining question is whether the provision of section 4529 of the Revised Statutes, as amended December 21, 1898, imposing the designated penalty for failure to pay the wages within the required time, is applicable to the case.

It is first contended on behalf of the appellant that the section referred to expressly relates to "seamen shipped under an agreement." That is true; but the answer is, as has been above
101 pointed out, that the libelant was a seaman and rendered the service for which he libeled the ship under shipping articles duly executed and in force at the time of the rendition of the service.

The further contention is made that it has been uniformly held that the penalty will not be imposed in any case where there is a fair ground of dispute. Conceding the justice of the rule, we are of opinion that the evidence in the present case does not show any such fair ground of dispute.

It has been suggested that the libelant's entire cause of action was merged in the judgment entered in the trial court, that the delay in paying that judgment is compensated for by interest thereon, and also that the prescribed penalty is too severe to impose upon a litigant while acting in good faith. Apart from the fact that the Court has no right to hold the penalty which Congress saw fit to prescribe is too severe, the latter suggestion is, we think, answered

by the above statement to the effect that in this case the appellant had no fair ground upon which to base its refusal to pay the seaman his wages.

Nor do we think the ordinary rule respecting the merger of a cause of action in a judgment applicable to such a case as the present; for while the statute declares that the prescribed penalty "shall be recoverable as wages in any claim made before the Court," it does not limit it to the time of the entry of the judgment of the trial court, but, on the contrary, expressly declares that the master or owner who refuses or neglects to make payment of the seamen's wages in the manner therein specifically prescribed "without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods."

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Certainly by appealing from the judgment of the Court of First Instance and procuring a stay of that judgment, the appellant as effectively delayed the payment of the wages adjudged to be due the seaman as it did by refusing without sufficient cause to pay him upon his discharge, and we can see no valid ground for holding that a court of admiralty in disposing of a cause so brought before it may not give effect to the express requirement of the statute by directing the Court below to enter the appropriate judgment upon the return of the cause to it. Congress did not see fit to allow the legal interest on the judgment first entered by the trial Court to compensate the seaman for the delay in the payment of his wages in the prescribed circumstances, but expressly declared that he should be allowed "a sum equal to one day's pay for each and every day during which payment is" so delayed.

It results that the judgment of the Court below was correct when rendered, but, as under the provisions of section 4529 of the Revised Statutes the appellee is entitled to one day's pay for every day since October 1, 1913, in addition to the amount due him for services, the cause is remanded to the court below with directions to enter a decree in accordance with the views above expressed, with costs to the appellee in both courts.

103

[Endorsed:] Opinion. U. S. Circuit Court of Appeals. Filed May 18, 1914. [Signed] F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Dissenting Opinion [Dietrich, District Judge].

DIETRICH, *District Judge:*

I am unable to concur in that part of the opinion in which it is held that the lower court should now enlarge the original decree by

including therein the statutory penalty for the time which has elapsed since the decree was entered. I fail to see any substantial reason for concluding that the plaintiff's cause of action was not merged in and swallowed up by the decree, as is the general rule. United States vs. Price, 50 U. S. 83, 93.

As to the severity of the penalty, there is of course no thought of suggesting that a Court can properly decline to enforce a statute because it may seem to be unnecessarily harsh. But the question being, what is the meaning of the statute, what penalty Congress really intended to impose, it is deemed proper to consider the effect of the law in practical operation; for if, under one of two
104 possible constructions, it will operate with extreme and unnecessary severity, and under the other it will operate reasonably and yet accomplish the purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the Court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the Court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The right of appeal is thus virtually denied, for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim, but that does not necessarily imply bad faith or a willingness to oppress; it is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this court; it also presents here, as is its right, the question of the correctness of the lower court's holding that the case falls within the provisions of section 4529 of the Revised Statutes, imposing the penalty complained of, and this I conceive to be a fair question the answer to which is not free from serious doubt.

It is to be borne in mind that the law is rendered harsh, not by interpreting it in the light of a general principle, that is, the principle of merger, with which it may be assumed Congress was
105 familiar, but by holding that it is exempt from the operation thereof, and is an exception to the rule. No reason is assigned for such a course except that which may be found in a rigidly literal reading of the provision. But why should we insist that the strict letter of the provision prevail over the presumption that Congress intended that in the administration of the law regard should be had for the general principles under which other laws of like character are administered. A decision directly in point is that of Mass. vs. Western Union Telegraph Co., 141 U. S. 40, 46. A statute of Massachusetts imposed a penalty for the nonpayment of taxes "at the rate of twelve per cent per annum until the same (the taxes) are paid." There, as here, by the strict terms of the law there was to be a continuous accumulation of the penalty until the principal obligation was discharged. But the Court said: "The penal rate of twelve per cent interest ran only until the amount to be recovered was judicially

ascertained. Since the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of six per cent only." Upon principle I cannot see how that case can be distinguished from this, and it should, I think, be held to be conclusive.

Appreciating the strain, the appellee suggests that this being an admiralty case the trial here is de novo, and that final decree is in this court; but this is an erroneous assumption. Benedict's Admiralty, 4th ed., sec. 566. As appears from the opinion, there has been no new trial, nor will any decree be entered here.

106 [Endorsed:] Dissenting Opinion. Filed May 18, 1914. [Signed] F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Decree [U. S. Circuit Court of Appeals].

Appeal from the District Court of the United States for the Northern District of California, Division No. 1.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Division No. 1, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause be, and hereby is, remanded to the said District Court with directions to enter a decree in accordance with the views expressed in the opinion of this Court, with costs to the appellee in both courts.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs expended in this cause in both courts, and have execution therefor.

107 [Endorsed:] Decree, U. S. Circuit Court of Appeals. Filed and entered May 18, 1914. [Signed] F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Thirteenth Day of October, in the Year of our Lord One Thousand Nine Hundred and Fourteen.

Present:

The Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert and Erskine M. Ross, Circuit Judges, and Frank S. Dietrich, District Judge, before whom the cause was heard, it is ordered that the Petition, filed June 17, 1914, on behalf of the appellant for a rehearing of the above entitled cause be, and hereby is denied.

108 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Order Staying Mandate.

Upon application of Knight & Heggerty, attorneys for the appellant in the above-entitled cause, and on their representation that they have in course of preparation for filing with the Clerk of the Supreme Court of the United States their Petition for Writ of Certiorari in this cause, and cause sufficient to the Court appearing:

It is ordered that the Mandate of this court in the above-entitled cause be stayed until and including the 4th day of January, 1915.

Dated: December 9th, 1914.

WM. B. GILBERT,
ERSKINE M. ROSS,
Judges of the Circuit Court of Appeals.

[Endorsed:] Order Staying Mandate. Filed Dec. 14, 1914. F. D. Monckton, Clerk.

109 [*Præcipe for Transcript of Apostles.*]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

To the Clerk of the said Court:

SIR: Please make and issue a certified Printed Transcript of Apostles, and nine (9) uncertified printed copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under Section 240 of the Judicial Code, in the above-entitled cause, the said Transcript to consist of the following:

1. Copy of Printed Apostles on which the above-entitled cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:
2. Order entered March 6, 1914, submitting cause;
3. Order entered May 18, 1914, Directing Filing of Opinion and Dissenting Opinion;
4. Opinion and Dissenting Opinion;
5. Decree;
6. Order, entered Oct. 13, 1914, Denying Petition for Rehearing;

110 7. Order filed Dec. 14, 1914, Staying Issuance of Mandate under Rule 32;

8. Præcipe for certified Transcript of Apostles, etc., and
9. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

KNIGHT & HEGGERTY,
Counsel for Appellant.

[Endorsed:] Præcipe for Transcript of Apostles, etc. Filed Dec. 7, 1914. (Signed) F. D. Monckton, Clerk.

111 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and ten (110) pages, numbered from and including 1 to and including 110, to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to the præcipe of counsel for the appellant, filed therefor on the seventh day of December, A. D. 1914, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-first day of December, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Dec. 21, 1914. F. D. M.]

112 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Pacific Mail Steamship Company, a corporation, is appellant, and Ed Schmidt is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the

113 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of March, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

114 [Endorsed:] File No. 24,512. Supreme Court of the United States, No. 768, October Term, 1914. Pacific Mail Steamship Company, Petitioner, vs. Ed Schmidt. Writ of Certiorari. Docketed. No. 2352. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 9, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

115 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by and between the Proctors and Attorneys of record in the above-entitled cause, that the Transcript of the Record now on file in the Supreme Court of the United States in the case of Pacific Mail Steamship Company, a Corporation, Appellant vs. Ed Schmidt, Appellee, No. 768, of October Term 1914, of said Supreme Court, together with the motion of Appellant for leave to deposit certain sum, etc. with Clerk of the District Court and the Order of the Court made thereon to be printed and certified by the Clerk of this Court, and to be filed with a Certified Copy of this Stipulation in the Supreme Court, shall stand as and constitute the Return of the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, to the Writ of Certiorari issued out of said Supreme Court on the 1st day of March, A. D. 1915.

Dated: April 7th, 1915.

GEO. A. KNIGHT,
CHARLES J. HEGGERTY,
KNIGHT & HEGGERTY,
Proctors and Attorneys for Appellant.
JOHN L. McNAB AND
JAMES W. RYAN,
Proctors for Appellee.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Original. Filed Apr. 9, 1915. F. D. Monckton, Clerk.

116 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above-entitled cause on this 9th day of April, A. D. 1915, as the original thereof remains on file and appears of record in my office.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this ninth day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/9/1915. F. D. M., Clerk.]

117 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352. Original.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Motion for Order Allowing Appellant to Deposit in the Registry of the District Court to Pay Appellee or His Proctor Amount of Wages Awarded by Decree of District Court, With Interest, Proctor's Fee and Costs in District Court, Without Prejudice to Further Prosecution of Appeal as Against Penalty Awarded by Decree and Continuing Penalty Awarded by this Court:

Now comes the Appellant in the above-entitled cause and moves the Court for an Order directing that Appellant be allowed and permitted to Deposit in the Registry of the District Court or pay to the Appellee or his Proctor, the amount of $30.22 wages decreed by the District Court in favor of Appellee, and Interest thereon at 7% per annum to date of such payment or deposit, and $38.35 the amount

of Proctor's Fee and Costs of Appellee in the District Court, reserving to Appellant the right and without prejudice to the right of Appellant to proceed with and further prosecute in this Court and to and in the Supreme Court, if so advised, the Appellant's Appeal now pending in said cause from the Decree of the District Court, as against the Penalty and amount thereof decreed in favor of Appellee to the date of its Decree by the District Court and as against
118 the Penalty and continuing Penalty which the Opinion and Judgment of this Court on Appellant's Appeal awarded and directed to be given, allowed and decreed to the Appellee by the District Court.

This Application and Motion are based and made upon the records and files of this Court and upon the grounds that Appellant has, in good faith and with reasonable diligence taken and perfected its Appeal to this Court from the entire Decree of the District Court, and because of the amount of Penalty decreed against Appellant in the District Court and the Opinion and Judgment of this Court on this appeal that because the amount of the Decree for wages was not paid and Appellant gave bond and obtained a supersedeas that the Penalty still continued until the amount of said wages should be paid notwithstanding the Appeal and notwithstanding that the Decree of the District Court allowed interest only upon the amount of the Decree from its date; and because it is unjust to Appellant that while now willing and ready and offering to pay the amount of such wages, interest, Proctor's fee and costs in the District Court, that Appellant should be precluded from continuing to prosecute its Appeal as against the imposition of and liability for the Penalty under Section 4529, R. S.

This Motion will be called for hearing before this Court on Monday, July 6, 1914, at the opening of said Court.

Dated: July 1, 1914.

KNIGHT & HEGGERTY,
Proctors for Appellant.

To James W. Ryan, Esq., Proctor for Appellee.

[Endorsed:] Receipt of a copy of the within Motion for Order is hereby admitted this 1st day of July, 1914. James W. Ryan, Proctor for Appellee. Motion of Appellant for Order. Original. Filed Jul. 1, 1914. F. D. Monckton, Clerk.

119 At a state Term, to-wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding,
Honorable Erskine M. Ross, Circuit Judge,
Honorable William W. Morrow, Circuit Judge.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, Appellant,
vs.
ED. SCHMIDT, Appellee.

Order on Motion for Order Allowing Appellant to Deposit in Registry of District Court Wages Awarded by Decree of District Court, etc.

In this cause, upon submission and due consideration of the Motion of Appellant, it is ordered that the appellant pay to Proctor for appellee the amount of the judgment as rendered by and entered in the District Court to date of that judgment, together with the costs and proctor's fees allowed in the District Court, and it is further ordered that within ten days the appellant pay to and deposit with the clerk of the District Court the additional amount to date of such deposit of the penalty adjudged by the judgment on appeal of this Court as continuing and accruing from the date of the judgment in the District Court, and that the amount of such payment to and deposit with the clerk of the District Court be impounded and held by the clerk of the District Court subject to and to be paid to
120 the appellee in the event that a writ of certiorari be denied by the Supreme Court, and to be refunded and repaid to appellant in the event that the Supreme Court should allow a writ of certiorari and finally reverse the judgment of this Court as to the said additional and continuing penalty imposed by the judgment of this Court; and it is further ordered that upon such payments and deposit being made by appellant the running of said penalty shall cease insofar as the judgment of this Court is concerned.

121 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Copy of Motion and Order.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four (4) pages, numbered from and including 1 to and including 4, to be a full, true and correct copy of, respectively:

(1) Motion for Order Allowing Appellant to Deposit in the Registry of the District Court to pay Appellee or his Proctor Amount of Wages Awarded by Decree of District Court, with Interest, Proctor's Fee and Costs in District Court, Without Prejudice to Further Prosecution of Appeal as Against Penalty Awarded by Decree and Continuing Penalty Awarded by this Court, filed in said cause on the first day of July, A. D. 1914; and

(2) Order on Motion for Order Allowing Appellant to Deposit in Registry of District Court Wages Awarded by Decree of District Court etc., entered in said cause on the sixth day of October, A. D. 1914, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this ninth day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/9/1915. F. D. M., Clerk.]

122 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2352.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
ED. SCHMIDT, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of cer-

tiorari, issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of:

(1) A Stipulation as to Return to Writ of Certiorari, the original of which said Stipulation was filed in said cause on this ninth day of April, A. D. 1915;

(2) A Motion for Order Allowing Appellant to Deposit in the Registry of the District Court to pay Appellee or his Proctor Amount of Wages awarded by Decree of District Court, with Interest, Proctor's Fee and Costs in District Court, without Prejudice to Further Prosecution of Appeal as Against Penalty Awarded by Decree and Continuing Penalty Awarded by this Court,—the original of which said Motion was filed in said cause on the first day of July, A. D. 1914; and

(3) An Order on Motion for Order Allowing Appellant to Deposit in Registry of District Court Wages Awarded by Decree
123 of District Court etc.,—the original of which said order was entered in said cause on the sixth day of October, A. D. 1914, and in accordance with said Stipulation, do hereby send the said certified copy thereof, together with the said certified copy of said Motion and Order, to the said Supreme Court as the Return to the said Writ of Certiorari.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[United States, internal revenue documentary stamp, series of 1914, ten cents, canceled 4/9/1915. F. D. M., Clerk.]

[Endorsed:] 768—24512.

124 [Endorsed:] File No. 24,512. Supreme Court U. S. October term, 1914. Term No. 768. Pacific Mail Steamship Company, Petitioner, vs. Ed Schmidt. Writ of certiorari and return. Filed April 29, 1915.

2

No. 768 323

In the Supreme Court

OF THE

United States

October Term, 1914

Office Supreme Court, U. S.
FILED
JAN 14 1915
JAMES D. MAHER
CLERK

PACIFIC MAIL STEAMSHIP COMPANY,

Petitioner,

vs.

ED. SCHMIDT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit.

Geo. A. Knight,
Chas. J. Heggerty,
Knight & Heggerty,
Attorneys and Proctors for Petitioner.

Filed this ..... *day of January, 1915.*

JAMES D. MAHER, Clerk.

By ..... *Deputy Clerk.*

Pacific Publishing Co., S. F.

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,

Petitioner,

vs.

ED. SCHMIDT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Pacific Mail Steamship Company, respectfully represents to the Court that the case of Pacific Mail Steamship Company, appellant,

versus Ed. Schmidt, respondent, lately decided by the Circuit Court of Appeals for the Ninth Circuit, remanding the cause to the Court below with directions to enter a decree for an additional penalty since decree below in favor of respondent Schmidt (who did *not* appeal), and against appellant therein, in accordance with the views expressed in its opinion, is a case *in admiralty* in which the decree is made final by the provisions of the Judicial Code; and your petitioner applies to this Honorable Court to require by certiorari or otherwise, said case to be certified to the Supreme Court of the United States for its review and determination.

Judge *Dietrich* dissenting, says of this judgment of the Court of Appeals:

> **" * * * it will operate with extreme and unnecessary severity * * * What will be the result * * * upon an obligation of $30 penalties of $800 have already (May 18, 1914) accrued * * * The right of appeal is virtually denied * * * no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards" (Tr. p. 104).**

Summary Statement.

On this admiralty appeal from a final decree *in personam* against the Steamship Company as owner of the "City of Sydney" wherein the District Court had adjudged that the Steamship Company pay respondent Schmidt (1) $30.33 as *seaman's wages* as chief steward from September 24 to October 1, 1913, at $4.33 per day, and (2) because the

Steamship Company insisted that Schmidt make good the value of silverware not accounted for from the previous voyage amounting to $32.90, as an offset against his port wages and failed on the hearing to establish its claim, the District Court imposed *a penalty* of $121.26, under Section 4529 R. S., for not paying these wages from October 8 to the date of that decree November 5, 1913, and (3) *interest thereafter* on the total amount of the decree at 7% per annum; the Circuit Court of Appeals for the Ninth Circuit, held and ruled that (a) the penalty was not merged in the final decree so that the amount of the final decree would bear *interest* only, but (b) the penalty continued to run until the amount adjudged for wages should be paid, although the Steamship Company had in good faith and with unusual speed perfected an appeal and given a supersedeas bond, because the taking of such appeal and giving the supersedeas bond as effectively stayed the payment of the wages as did the original refusal to pay, and the *penalty continued* and *would continue to run* notwithstanding the final decree and appeal, until the amount adjudged for wages should be paid; and the Circuit Court of Appeals on May 18, 1914, remanded the cause with directions to the District Court to enter a decree awarding to respondent against the Steamship Company a *penalty* of one day's pay for every day since October 1, 1913, until the $30.33 wages should be paid (Tr. pp.

101 and 106); and denied a rehearing October 13, 1914.

To review this decree of the Circuit Court of Appeals, awarding an additional penalty *then* amounting to about $800 (Tr. p. 104) and *now* aggregating $1,550 this application is made.

Schmidt v. Pacific Mail Steamship Co. (D. C.), 209 Fed. 264;

Pacific Mail Steamship Co. v. Schmidt (C. C. A.), 214 Fed. 513.

The Facts.

At the port of San Francisco, on (Tr. pp. 54, 56) July 24, 1913, the respondent signed shipping articles as chief steward of petitioner's steamship "City of Sydney", at wages of $100 per month (Tr. p. 56), for the round voyage to Balboa coastwise and return to San Francisco, the terminal port of that vessel; that voyage terminated September 24, 1913, when he was paid in full (Tr. pp. 21, 27) for his services and signed off the articles before the Government Shipping Commissioner, and his service under the shipping articles then ended.

The custom of the Steamship Company was that on the termination of a round voyage those members of the late crew who it expected to again go out with the vessel and who would sign new articles before sailing on her next round voyage, would continue (Tr. pp. 30, 31) in the employ of the com-

pany at shore pay consisting of the same wages as at sea and $1 per day victualling money, the respondent eating and sleeping ashore while the vessel was in this port. Under this custom the respondent remained from September 24 to and including October 1, in the employ of the Steamship Company (*not* the ship), preparing his department for the next voyage, while the vessel was discharging and loading its cargo. He was not working under and had not signed shipping articles during this time.

An inventory was taken during this time of the personal property asserted by the company to have been placed in the custody of the respondent as chief steward upon the previous voyage showing a *shortage* of silverware amounting in value to $32.90; this shortage and respondent's liability therefor were disputed, and respondent refusing to pay therefor, on October 1, 1913, he was discharged; his *shore* wages then amounted to $30.33.

October 20, 1913, respondent filed a libel *in personam* against the company, alleging that the *company hired* him on September 24, 1913, at San Francisco, as chief steward at the wages of $100 per month and $1 per day *victualling* money, entered upon that service on September 24, 1913 (Tr. p. 5), and October 1 was discharged (Tr. pp. 5, 6); he *prayed* for $30.33, wages and victualling money to October 2, 1913, and $82.27 alleged *penalty* under Section 4529, R. S., from October 1 to filing libel on October 20 (Tr. p. 7).

Steamship Company *answered,* denying the hiring and service averred in libel, alleging service by respondent on said round voyage terminated September 24, under shipping articles and payment of wages thereunder in full, that he then went to shore duty and pay and earned as wages $30.33, and against these wages alleged as *set off* the value of said silverware shortage $32.90 (Tr. pp. 11-15); also, averred that claim of respondent against company for these shore wages, not under shipping articles, was not within the *admiralty* jurisdiction of the District Court, that the wages were not "seaman's wages", and he was not a seaman entitled to sue *in personam* in admiralty, in performing these services (Tr. p. 15).

The District Court on November 5, 1913, made its *final decree* (Tr. p. 63), and awarded to respondent a lump sum of $151.59 *with legal interest thereon* from date thereof, such sum being made up of the $30.33 wages and $121.26 *penalty* for not paying these wages, under Section 4529, R. S.

Petitioner *appealed* to the Circuit Court of Appeals for the Ninth Circuit and gave a supersedeas bond; the majority of that Court (Judge *Ross* rendering the opinion, Judge *Gilbert* concurring and Judge *Dietrich* dissenting), rendered its opinion and judgment sustaining respondent's right to recover and stating its conclusions and adjudging an *increased penalty* against the company (Tr. p. 102) as follows:

"Certainly *by appealing* from the judgment of the Court of First Instance and procuring a stay of the judgment, the appellant as effectively delayed the payment of the wages adjudged to be due the seaman as it did by refusing without sufficient cause to pay him on his discharge, and we can see no valid ground for holding that a court of admiralty in disposing of a cause so brought before it may not give effect to the express requirement of the statute by directing the Court below to enter the appropriate judgment upon the return of the cause to it. Congress did not see fit to allow the legal interest on the judgment first entered by the trial Court to compensate the seaman for the delay in the payment of his wages in the prescribed circumstances, but expressly declared that he should be allowed 'a sum equal to one day's pay for each and every day during which payment is' so delayed.

"It results that the judgment of the Court below was correct when rendered, but, as under the provisions of Section 4529 of the Revised Statutes the appellee is entitled to one day's pay for every day since October 1, 1913, in addition to the amount due him for services, the *cause is remanded* to the Court below with directions *to enter a decree* in accordance with the views above expressed."

Judge *Dietrich*, the other member of that Court, rendered a *dissenting* opinion, relating to this increase of penalty, stating in part:

"But the question being, what is the meaning of the Statute, what penalty Congress really intended to impose, it is deemed proper to consider the effect of the law in practical operation; for if, under one of two possible constructions it will operate with *extreme and*

unnecessary severity, and under the other it will operate reasonably and yet accomplish the purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the Court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the Court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The *right of appeal is thus virtually denied,* for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim, but that does not necessarily imply bad faith or a willingness to oppress; it is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this Court; it also presents here, as is its right, *the question* of the correctness of the lower Court's holding that the case falls within the provisions of Section 4529 of the Revised Statutes, imposing the penalty complained of, and *this I conceive to be* a fair question the answer to which is *not free from serious doubt"* (Tr. pp. 103-104).

General Reasons Relied on for Allowance of Writ of Certiorari.

First. Because, upon the entry of the final decree by the District Court awarding to respondent a specific sum as the wages due and the amount of *penalty* described under Section 4529 R. S. for

failure to pay the wages, and adjudging that the amount of the decree for wages and penalty should thereafter bear interest at 7% per annum, the entire cause of action of respondent both for wages and penalty became *merged* in that final decree, and legal *interest* only would be the additional penalty imposed for failure to pay the amount of that decree (*U. S. v. Price,* 50 U. S. 83, 93; Sec. 966, R. S.); and the Court of Appeals erred and denied to petitioner the right of appeal in adjudging the right of respondent to an *additional* (then aggregating $800) and *continuing* penalty until the $30.33 *wages* should be paid, because we had appealed and given a supersedeas bond. And especially did that Court err, even if under the law the penalty is not merged in the decree, because, *without any appeal by respondent* from the final decree below, on *our* appeal *he* was awarded an additional recovery which that Court had no jurisdiction to grant him except upon an appeal of his own which he did *not* take. One who has not appealed can be heard only to support the decree and can get in the appellate Court no more relief than has been allowed him in the lower Court (Benedict (4th Ed.), Sec. 566, p. 392).

Second. Because the decree of the Circuit Court of Appeals is erroneous under and *contrary* to the decision and judgment of the Supreme Court in *Attorney General of Massachusetts v. Western Union Telegraph Co.,* 141 U. S. 40, 46, wherein, under a statute of that state it was provided that delinquent corporation taxes should bear 12% per

annum *"until the same are paid"*, and this Court, reversing the decree below *continuing after decree* the 12% interest until the taxes should be paid, said:

> "The *penal* rate of twelve per cent interest ran *only until* the amount to be recovered was judicially ascertained. *Since* the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of 6% *only.*"

That also, is the rule under Sec. 966, R. S.

Third. Because Schmidt was not, in performing these port services, protected by or a "seaman" under the provisions of Section 4529, R. S., for the reason that that section does not apply to shore or port wages, but only to *sea* wages, and expressly relates to *"seamen shipped under an agreement"*, while Schmidt was a chief steward in port of final discharge and had *not shipped* under any agreement at all, but was performing shore or port services under the custom of the Steamship Company while its vessels were in their home port or port of departure and final discharge, and that section was not intended to apply to such vessels in their port of final discharge; that no jurisdiction *in personam* in the admiralty exists for such port or shore services, and if any jurisdiction existed it would necessarily be *in rem* against the "City of Sydney" (*The Queen v. The Judge &c.*, 25 Law Reports, Q. B. D., 339). It is only as a member of the crew of a vessel that a seaman earns wages protected by this section, and he only becomes a member of the

crew from the time he signs articles (*The Ida Farren,* 127 Fed. 766; *Tucker v. Alexandorff,* 188 U. S. 424).

Fourth. Because, the *right of appeal* is unlawfully burdened and substantially denied to the petitioner by the decree of the Circuit Court of Appeals for having, in good faith, upon reasonable grounds and with commendable speed, taken an appeal from a decree awarding wages to a chief steward in port and not under articles, and giving a supersedeas bond on such appeal (Tr. pp. 103-104).

Fifth. Because the "City of Sydney" was engaged in the *coastwise* trade between San Francisco and Balboa; Section 4529, R. S., containing this penalty, was taken from the "Shipping Commission Act" of June 7, 1872 (17 Statute 262), and was repealed by Act of June 9, 1874 (18 Statute 64), which latter Act expressly declares that *"none of the provisions"* of the Shipping Commission Act, *"shall apply* to * * * steam vessels engaged in the coastwise trade, *except* the coastwise trade between the Atlantic and Pacific Coasts", etc.; and Section 2447, R. S., which provides for shipping crews in the *coastwise* trade, also, expressly declares: "* * * Such seamen shall be discharged and receive their wages as provided by the *first clause* of Section 4529", and the penalty for not paying is found *not* in the first, but in the *second* clause of Section 4529, R. S. (*U. S. v. The Grace Lathrop,* 95 U. S. 527; *Id.,* 536; *Wilson v. Manhattan C. Co.,* 205 Fed. 996).

The decision of the District Court is reported: *Schmidt v. Pacific Mail Steamship Co.,* 209 Fed. 264; and in the Circuit Court of Appeals: *Pacific Mail Steamship Company v. Schmidt,* 214 Fed. 513; a *rehearing* was *denied* October 13, 1914.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to the Supreme Court of the United States, for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said case therein, entitled: "*Pacific Mail Steamship Company, Appellant, v. Ed. Schmidt, Respondent,* Number 2352," pursuant to Section 240 of the Judicial Code, and that said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court; and that your petitioner may have such other or further relief in the premises as to this Honorable Court may seem meet and in conformance with Section 6, of the Act of March 3, 1891, and with said section; and your petitioner will ever pray, etc.

Dated, San Francisco,
January 2, 1915.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

State of California,
City and County of San Francisco.—ss.

Chas. J. Heggerty, of lawful age, being first duly sworn, deposes and says:

That he is one of the proctors for Pacific Mail Steamship Company, the petitioner named in the foregoing petition; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

CHAS. J. HEGGERTY.

Subscribed and sworn to before me this 2nd day of January, 1915.

(Notarial Seal) GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

No. 768

FILED
JAN 14 1915
JAMES D. MAHER
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,

Petitioner,

vs.

ED. SCHMIDT,

Respondent.

MOTION AND NOTICE OF MOTION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

Filed this.....day of January, 1915.

JAMES D. MAHER, Clerk.

By.....Deputy Clerk.

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,

Petitioner.

vs.

ED. SCHMIDT,

Respondent.

MOTION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit.

Now comes Pacific Mail Steamship Company, by its attorneys and proctors appearing in that behalf, and moves this Honorable Court that it shall, by certiorari, or other proper process, directed to the honorable judges of the United States Circuit Court of Appeals for the Ninth Circuit, require

said Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein your petitioner, Pacific Mail Steamship Company, was appellant, and Ed. Schmidt, was respondent; and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

Dated, San Francisco,
January 2, 1915.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,
Petitioner.

vs.

ED. SCHMIDT,
Respondent.

NOTICE OF MOTION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit.

To the respondent in the above-entitled action and to his attorney and proctor:

Please take notice that on Monday, the 1st day of February, 1915, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, Pacific Mail Steamship Company, petitioner

herein, will, upon its verified petition and copies of the entire record in this cause submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

Dated, San Francisco,
January 2, 1915.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

Respondent and to James W. Ryan,
Attorney and Proctor for Respondent.

The foregoing notice is hereby accepted, and delivery of a copy thereof, and of the petition for writ of certiorari, and brief in support of said motion, are hereby acknowledged this 4th day of January, 1915.

JAMES W. RYAN,
Attorney and Proctor for Respondent.

No. 323

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914

Office Supreme Court, U. S.
FILED
JAN 14 1915
JAMES D. MAHER
CLERK

PACIFIC MAIL STEAMSHIP COMPANY,
Petitioner,

vs.

ED. SCHMIDT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

Filed this ..... *day of January, 1915.*

JAMES D. MAHER, Clerk.

By ..... *Deputy Clerk.*

PERRAU PUBLISHING COMPANY, S. F.

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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,
Petitioner,

vs.

ED. SCHMIDT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition for a writ of certiorari involves consideration of the opinion and decree (Tr. p. 106) of the Circuit Court of Appeals for the Ninth Circuit rendered and made on May 18, 1914, remanding the cause to the District Court with directions to enter a decree in accordance with the views expressed in the opinion of the Court; and the opinion (Tr. p. 102) states:

"Certainly *by appealing* from the judgment of the Court of First Instance and procuring a stay of the judgment, the appellant as effectively delayed the payment of the wages adjudged to be due the seaman as it did by refusing without sufficient cause to pay him on his discharge, and we can see no valid ground for holding that a court of admiralty in disposing of a cause so brought before it may not give effect to the express requirement of the statute by directing the Court below to enter the appropriate judgment upon the return of the cause to it. Congress did not see fit to allow the legal interest on the judgment first entered by the trial Court to compensate the seaman for the delay in the payment of his wages in the prescribed circumstances, but expressly declared that he should be allowed 'a sum equal to one day's pay for each and every day during which payment is' so delayed.

"It results that the judgment of the Court below was correct when rendered, but, as under the provisions of Section 4529 of the Revised Statutes the appellee is entitled to one day's pay for every day since October 1, 1913, in addition to the amount due him for services, the *cause is remanded* to the Court below with directions *to enter a decree* in accordance with the views above expressed."

And the *dissenting* opinion of Judge Dietrich, wherein he states:

"But the question being, what is the meaning of the Statute, what penalty Congress really intended to impose, it is deemed proper to consider the effect of the law in practical operation; for if, under one of two possible constructions it will operate with *extreme and unnecessary severity,* and under the other it will operate reasonably and yet accomplish the

purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the Court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the Court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The *right of appeal is thus virtually denied,* for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim, but that does not necessarily imply bad faith or a willingness to oppress; it is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this Court; it also presents here, as is its right, *the question* of the correctness of the lower Court's holding that the case falls within the provisions of Section 4529 of the Revised Statutes, imposing the penalty complained of, and *this I conceive to be* a fair question the answer to which is *not free from serious doubt"* (Tr. pp. 103-104).

The appeal was from a final decree in admiralty adjudging in favor of respondent as follows (Tr. p. 63):

> "And it is further ordered, adjudged and decreed, that the libellant, Ed. Schmidt, do have and recover from the respondent Pacific Mail Steamship Company, the sum of $151.59, *with legal interest* thereon from date hereof * * *" (Tr. p. 63).

The Facts.

At the port of San Francisco, on (Tr. pp. 54, 56) July 24, 1913, the respondent signed shipping articles as chief steward of petitioner's steamship "City of Sydney", at wages of $100 per month (Tr. p. 56), for the round voyage to Balboa coastwise and return to San Francisco, the terminal port of that vessel; that voyage terminated September 24, 1913, when he was paid in full (Tr. pp. 21, 27) for his services and signed off the articles before the Government Shipping Commissioner, and his service under the shipping articles then ended.

The custom of the Steamship Company was that on the termination of a round voyage those members of the late crew who it expected to again go out with the vessel and who would sign new articles before sailing on her next round voyage, would continue (Tr. pp. 30, 31) in the employ of the company at shore pay consisting of the same wages as at sea and $1 per day victualling money, the respondent eating and sleeping ashore while the vessel was in this port. Under this custom the respondent remained from September 24 to and including October 1, in the employ of the Steamship Company (*not* the ship), preparing his department for the next voyage, while the vessel was discharging and loading its cargo. He was not working under and had not signed shipping articles during this time.

An inventory was taken during this time of the personal property asserted by the company to have

been placed in the custody of the respondent as chief steward upon the previous voyage showing a *shortage* of silverware amounting in value to $32.90; this shortage and respondent's liability therefor were disputed, and respondent refusing to pay therefor, on October 1, 1913, he was discharged; his *shore* wages then amounted to $30.33.

October 20, 1913, respondent filed a libel *in personam* against the company, alleging that the *company hired* him on September 24, 1913, at San Francisco, as chief steward for a part of a voyage from Balboa to San Francisco, and a *part* of a voyage from San Francisco to Balboa, at the wages of $100 per month and $1 per day *victualling* money, entered upon that service on September 24, 1913 (Tr. p. 5), and October 1 was discharged (Tr. pp. 5, 6); he *prayed* for $30.33, wages and victualling money to October 2, 1913, and $82.27 alleged *penalty* under Section 4529, R. S., from October 1 to filing libel on October 20 (Tr. p. 7). There was no suggestion even of any right or claim under former shipping articles; there was *no victualling* money under former articles (Tr. p. 56); so that, his libel was exclusively based upon a different hiring (by the *company*) than under former articles (by the *ship*).

Steamship Company *answered,* denying the hiring and service averred in libel, alleging service by respondent on said round voyage terminated September 24, under shipping articles and payment of wages thereunder in full, that he then went to

shore duty and pay and earned as wages $30.33, and against these wages alleged as *set off* the value of said silverware shortage $32.90 (Tr. pp. 11-15); also, averred that claim of respondent against company for these shore wages, not under shipping articles, was not within the *admiralty* jurisdiction of the District Court, that the wages were not "seaman's wages", and he was not a seaman entitled to sue *in personam* in admiralty, in performing these services (Tr. p. 15).

Respondent testified he shipped under articles in July, 1913, returned from that voyage September 23 (Tr. p. 21), and was paid off by Shipping Commissioner wages due him for that voyage (Tr. pp. 21, 27), and would have signed new articles day before leaving on next voyage (Tr. p. 23); after being paid off by Shipping Commissioner he remained cleaning up and preparing for next voyage (Tr. p. 22) at same rate and $1 per day meal money (Tr. p. 26) until October 1st at 5 P. M. (Tr. p. 27), when he was discharged; he asked for his wages, the port pay due him, $30.33 (Tr. p. 33), and company said he owed $32.90 for silver missing on the ship (Tr. p. 33); he refused to pay for the missing silver and company refused to pay these port wages (Tr. pp. 40, 41); his proctor *admitted* these articles were short when they returned from the voyage and that the values were correct (Tr. p. 50).

The District Court on November 5, 1913, made its *final decree* (Tr. p. 63), and awarded to respondent a lump sum of $151.59 *with legal interest thereon* from date thereof, such sum being made up of the $30.33 wages and $121.26 *penalty* for not paying these wages, under Section 4529, R. S.

Petitioner *appealed* to the Circuit Court of Appeals for the Ninth Circuit and gave a supersedeas bond; the majority of that Court (Judge *Ross* rendering the opinion, Judge *Gilbert* concurring and Judge *Dietrich* dissenting), rendered its opinion and judgment sustaining respondent's right to recover and stating its conclusions and adjudging an *increased penalty* against the company (Tr. p. 102)

That the Court may notice with what good faith, diligence and speed we assisted the learned proctor for appellee in bringing the questions in dispute to decision and judgment, we call the attention of the Court to *these facts,* that appellee claims these wages were payable to him on *October 1, 1913;* that *his* libel was filed *October 20* (Tr. p. 8); that apellant *answered* within *five days,* on *October 25* (Tr. p. 16); that, although *appellee* excepted to our answer, on *October 27* (Tr. p. 19), the case was tried and opinion rendered in appellee's favor on *October 29* (Tr. p. 19, and Tr. p. 61); *decree* filed *November 5* (Tr. p. 63); *appeal* taken *November 14* (Tr. p. 65); *all in one month;* so that, while the learned counsel for appellee does not even assert the contrary, this Court will see that appellant has

done *no act* to *delay* payment or recovery of appellee's wages, except to assert in good faith upon reasonable grounds, its right to set off the shortage of silverware against his claim for shore wages.

The decision of the District Court is reported: *Schmidt v. Pacific Mail Steamship Co.,* 209 Fed. 264; and in the Circuit Court of Appeals: *Pacific Mail Steamship Company v. Schmidt,* 214 Fed. 513; a *rehearing* was *denied* October 13, 1914.

ARGUMENT.

I.

The Circuit Court of Appeals erred in decreeing that the entire cause of action for wages and for the penalty, under Section 4529, R. S., for not paying the same, were *not merged* in the final decree of the District Court adjudging respondent entitled to recover a specified lump sum which included the wages and amount of penalty to the *date* of that decree, and that such *lump sum* should not thereafter bear *interest* at the legal rate, and in remanding the cause to the District Court with directions to enter a decree awarding respondent *additional* penalty *from* the date of the original final decree and *continuing until* the amount due for wages should be paid:—

First. Because, under the decisions of this and all other courts and text book writers, the general rule is that the original cause of action is *merged* in and swallowed up by the decree, and thereafter the decree bears legal interest only.

Dissenting Opinion of Judge Dietrich, Tr. pp. 103-106;

U. S. v. Price, 50 U. S. 83, 93;

Mass. v. Western U. Co., 141 U. S. 40, 46.

Section 966, R. S., provides:

> "*Interest* shall be allowed *on all judgments* in civil causes, recovered in a circuit or district court * * * and it shall be calculated *from the date of the judgment*, at such rate as is

allowed by law on judgments recovered in the courts of such states."

This decree of the Circuit Court of Appeals is erroneous under and *contrary* to the decision and judgment of the Supreme Court in *Attorney General of Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40, 46, wherein, under a statute of that state it was provided that delinquent corporation taxes should bear 12% per annum *"until the same are paid"*, and this Court, reversing the decree below *continuing after decree* the 12% interest until the taxes should be paid, said:

> "The *penal* rate of twelve per cent interest ran *only until* the amount to be recovered was judicially ascertained. *Since* the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of 6% *only.*"

In *23 Cyc.*, pp. 1108, 9 and 10, the result of the adjudications is thus stated:

> *"Doctrine of Merger.* A claim or demand being put in suit and passing to final judgment, is merged or swallowed up in the judgment, loses its vitality, and cannot thereafter be used either as a cause of action or as a set-off. Moreover, as a general rule *all the peculiar qualities* of the claim are *merged* in the judgment, which then stands on the same footing as all other judgments. And these rules apply to all species of demands," etc.

Freeman on Judgments (4th Ed.), Sec. 215, p. 380, says:

"The cause of action thus established and permanently attested is said to *merge* into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it is founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It is 'drowned in the judgment', and must henceforth be regarded as *functus officio.*"

Black on Judgments (2d Ed.), Sec. 674, p. 1022, says:

"*Merger* is the extinction of a lower right or remedy consequent upon its legal transformation or absorption into one of a higher force or dignity. It is the *comsumption* of a *right* of action by the recovery of a judgment upon it. No principle is better settled than that a judgment or decree establishes in the most conclusive manner the sum due upon the claim sued upon. The cause of action is merged in the judgment, and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect."

In *First National Bank of Newton v. Turner* (Kas. Court of Appeals), 42 Pacific 936, the action was to recover the penalty for receiving *usury,* and

interest was allowed on the penalty from the date the usurious interest was paid; the Court of Appeals of Kansas, modifying this judgment, said:

> "We apprehend that where a person violates a law, for the violation of which a punishment, penalty, or forfeiture is prescribed, the judgment of the Court should be for the amount prescribed by the statute, and should not include interest thereon from the time of the violation of the statute. The statutes of Kansas do not provide for interest upon such penalties. However, *after the penalty is merged into a judgment,* paragraph 3500 of the General Statutes of 1889 governs, and *the judgment draws interest from the day of its rendition.* The judgment of the district court is modified to correspond with this opinion."

So, in *State v. Owsley* (Mont.), 42 Pacific 105, an action to recover a forfeiture, the Court said:

> "The district court allowed interest on the amount of the penalty from the date of filing the complaint. There was no special averment of any vexatious or unreasonable delay on defendants' part, and, being satisfied that the defense was interposed in good faith, we think that the judgment should be modified by remitting all interest except upon the sum of $500, from the date of the rendition of the judgment, to wit, November 21, 1893."

SECOND. The respondent did *not* appeal, and the Circuit Court of Appeals erred in remanding the cause and directing an additional penalty from the date of the final decree below on our appeal. A respondent, not appealing, can only be heard in support of the decree and can obtain no greater

relief in the Appellate Court than the decree of the District Court awarded him; and the Circuit Court of Appeals in its opinion concluding expressly said:

> "It results that the judgment of the Court below was *correct* when rendered * * *" (Tr. p. 102).

What right, power or authority has the Circuit Court of Appeals to remand a cause with instructions to enter *another* decree, when the Circuit Court of Appeals expressly declares in its opinion (Tr. p. 102): "* * * the *judgment* of the Court below *was correct when rendered*"?

Benedict, Admiralty (4th Ed.), Sec. 566, says:

> "And in many cases it has been held that one who has not appealed from the decree below can be heard in the appellate Court only in support of that decree, and can get in the higher Court, no more relief than has been allowed him by the decree of the lower court.
>
> "All of those holdings follow the idea that a *present-day* appeal is *not* a new trial, and hence is not an admiralty appeal in the older sense of that term, but rather resembles a writ of error at common law."

THIRD. Because, the *right of appeal* is unlawfully burdened and substantially denied to the petitioner by the decree of the Circuit Court of Appeals for having, in good faith, upon reasonable grounds and with commendable speed, taken an appeal and given a supersedeas bond from a decree awarding wages to a former chief steward for services in port and not under articles (Tr. pp. 103-104).

The Circuit Court of Appeals did *not* question that the appeal was taken in *good* faith, and the fact that the majority *opinion* takes up pages 85 to 103 of the printed record—18 pages, is persuasive evidence that appellant had *reasonable grounds* for taking the appeal; and Judge *Dietrich* in his dissenting opinion (Tr. p. 104), says one of the questions involved, whether "the case falls within the provisions of Section 4529, R. S., imposing the penalty complained of," he conceives to be "a fair question which is not free from *serious* doubt."

That there was and can be no possible doubt of our good faith, diligence and speed in bringing the questions in dispute to decision and judgment, we call the attention of the Court to *these facts,* that appellee claims these wages were payable to him on *October 1, 1913;* that *his* libel was filed *October 20* (Tr. p. 8); that appellant *answered* within *five days,* on *October 25* (Tr. p. 16); that, although *appellee* excepted to our answer, on *October 27* (Tr. p. 19), the case was tried and opinion rendered in appellee's favor on *October 29* (Tr. p. 19, and Tr. p. 61); *decree* filed *November 5* (Tr. p. 63); *appeal* taken *November 14* (Tr. p. 65); *all in one month;* so that, while the learned counsel for appellee does not even assert the contrary, this Court will see that appellant has done *no act* to *delay* payment or recovery of appellee's wages, except to assert in good faith upon reasonable grounds, its right to set off the shortage of silverware against his claim for shore wages.

Judge *Dietrich* in his dissenting opinion, again says:

> "What will be the result of establishing the rule now laid down by the Court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The *right of appeal is thus virtually denied,* for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards" (Tr. p. 104).

In every case that has, prior to this, come before the federal Courts of this country, the terms "without sufficient cause" in Section 4529, Revised Statutes, have uniformly been held to mean and be the equivalent of "without reasonable cause", even though the Courts were compelled to hold such cause to be *insufficient in law,* and where payment was not arbitrarily refused and there was a fair question for controversy, this penalty has *never before been imposed.*

In *The George W. Wells,* 118 Federal, 761, 762, 763, the Court said:

> "It remains next to consider *if the libellants are entitled to the additional payment* provided for in Rev. St., Sec. 4529, as amended by Section 4, c. 28, Acts 1898; 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077). *Was the payment* of the wages *delayed 'without sufficient cause'?* That *the cause* of delay *was insufficient in law,* has just been determined, *but to construe the language thus narrowly is contrary to its reasonable intent.* Congress can hardly have

intended that in every controversy, however doubtful, which finally results in the seaman's favor, he shall be entitled to additional compensation so large. Let us suppose, for example, a disputed question of fact concerning wages, where the conduct of the sailor has been such that the court refuses him costs, though he finally prevails so far as to collect a small part of his original claim. Payment is delayed until the decree of the court, made a year or more after the claim accrued. Can it be that the Court is absolutely compelled, either in the original suit or in one subsequent, to award the libellant a bonus of four or five hundred dollars in addition to the four or five dollars of his wages actually detained? I think not. See The Alice B. Phillips (D. C.), 106 Fed. 956; The Topsy (D. C.), 44 Fed. 631, construing Statutes 17 and 18 Vict. c. 104, Sec. 187. It is easy to perceive that the construction of the statute urged by the libellant would encourage seamen to speculate upon controversies between themselves and the ship. The phrase *'without sufficient* cause' *should* rather *be construed as equivalent to* 'without *reasonable cause'*. In this sense there was reasonable cause in the case at bar for the delay in the payment."

In *The Empress,* 129 Federal, 655, 656, the Court said:

> "The statute is a *penal* statute, intended to punish masters of vessels who, *without any just excuse, arbitrarily refuse to pay* seamen their wages when due."

In *The St. Paul,* 133 Federal, 1002, the Court said:

> "The claimant, in my opinion, was justified in contesting its liability, and there should be

> no fines imposed under the statute imposing them for *unreasonable* delay in the payment of wages."

In *The Sadie C. Sumner,* 142 Federal 611, 613, the Court said:

> "Revised Statute, Section 4529, does not apply, as claimed in the libel, to such a case as this. There was *a fair question for controversy,* and therefore no refusal to pay without sufficient cause, within the meaning of that section. The George W. Wells, 118 Fed. 761; The Empress, 129 Fed. 655."

In *The Sentinel,* 152 Federal, 564, 566, the Court said:

> "Under the Peterson libel, the claimant shows reasonable grounds for disputing the claim, even if not able to make out a defense sufficient to prevent any recovery on the part of the libellant; and therefore the additional penal damages provided for in Section 4529 will not be allowed."

Also *The Amazon,* 144 Federal, 153, 154.

II.

Because respondent Schmidt was not, in performing these port services, protected by or a "seaman" under the provisions of Section 4529, R. S., for the reason that that section does not apply to shore or port wages, but only to *sea* wages, and expressly relates to *"seamen shipped under an agreement",* while Schmidt was a chief steward on the former

voyage in port of final discharge after discharge from articles and payment in full for former services as chief steward, and he had *not shipped* under any agreement at all, but was performing shore or port services under the custom of the Steamship Company while its vessels were in their home port or port of departure and final discharge, and that section 4529, R. S., was not intended to apply to such services and wages earned therefor on vessels in their port of final discharge. It is only as a member of the crew of a vessel that a seaman who has shipped earns wages protected by this section, and he only becomes a member of the crew from the time he ships and signs articles (*The Ida Farren,* 127 Fed. 766; *Tucker v. Alexandorff,* 188 U. S. 424).

Section 4529, Revised Statutes, provides as follows:

> "The master or owner of any vessel making coasting voyage shall pay to every seaman his wages within two days after the *termination of the agreement under which he shipped,* or at the time *such seaman* is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases *the seaman* shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore

> mentioned *without sufficient cause* shall pay to *the seaman* a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court; * * *"

Section 4529, Revised Statutes, does not apply to a case like the one at bar. It expressly relates to *"seamen", "shipped under an agreement",* that is, persons who ship, sign and serve as a member of the crew of a vessel *under Shipping Articles,* and to sea service, not to services performed by persons on vessels when they are in their port of final discharge either after the termination of the voyage or before the vessel sails upon her next voyage.

In its opinion, the Circuit Court of Appeals *agreed* with appellant upon the law, that Section 4529 Revised Statutes, expressly relates to "seamen shipped under an agreement"; that Court said:

> "It is first contended on behalf of the appellant that the section referred to expressly relates to seamen shipped under an agreement. *That is true"* (Tr. pp. 100-101).

And that Court then *mistakenly* states:

> "but the answer is, as has been above pointed out, that the libelant was a seaman and rendered *the services* for which he *libeled* the ship (a mistake, the libel was in personam) *under shipping articles* duly executed and *in force at the time* of the rendition of the service;" (Tr. pp. 100-101).

The Court had previously said on the question of *jurisdiction:*

> "In the present case the vessel was in active service, the present libellant a regular seaman *under* shipping articles, *whose term* of service had *not expired* and who, while the ship was discharging her cargo preparatory to *another voyage,* was cleaning ship, storing supplies therein," etc. (Tr. p. 92);

while the *facts are,* upon libellant's own claim in his libel, in his *exceptions* to our answer, in his *evidence* upon the trial, from the shipping *articles* themselves, from the *opinion* of the district judge, from the *decree* itself, and in the *brief* of the learned counsel for appellee, that the shipping articles were for a round voyage which *expired* on September 24, 1913, on which day the appellee was paid his wages in full, including that day, and he signed off on September 24, and his term of service had expired; his own claim is for wages under the appellant's *custom* while its ships are *in port,* viz.: the same wages as when at sea *with the addition* of $1 per day *victualling* money; and appellee was *not* therefore, on September 25, 1913, and at the time these services were performed, "a seaman shipped under an agreement"—his agreement and term of service had expired and he had not shipped under another or any agreement. The transcript (p. 56) shows expressly *the part* of the shipping articles declaring the date of termination of the voyage, thus: "These columns to be filled up at the *end* of the voyage. Date of termination of voyage, 9-24-13 (meaning September 24, 1913). Port at which voyage terminated, S. F." (Tr. p. 56).

The Circuit Court of Appeals having *agreed* with appellant that Section 4529, Revised Statutes, only and expressly applies to "seamen shipped under an agreement", *yet* the Court held (Tr. pp. 100-101) that the shipping *articles* were *in force* during the time appellee performed the services for which his libel seeks wages, viz.: September 25 to and including October 1, 1913, because the shipping articles provide for a *voyage, "from* the port of San Francisco *to* Ancon, Canal Zone, and such other ports and places in any part of the world as the master may direct, *and back to a final port of discharge in* San Francisco, the United States, *for a term of time not exceeding 6* calendar *months"*, and that, as the articles were dated July 24, 1913, the services in port were within that *six* months, and therefore performed *under* the articles; this conclusion is clearly erroneous, because the words in the articles: "for a term of time not exceeding 6 calendar months", do not mean or constitute *a hiring for* six months, but only that the *voyage* shall not last beyond *six* months, and if it does the seaman can demand and is entitled to be sent to this port *for final discharge,* and when the ship returns to this port and the seaman is paid and signs off, that ends and terminates the agreement *in* the articles, and this happened September 24; and this is demonstrated by the custom of the company and the $1 a day *victualling* money *in port* for which no provision is made in the articles, and also by the *clause* in the articles (Tr. p. 55) and quoted in the opinion

(Tr. p. 86), allowing the master "to transfer any * * * of the crew to any other * * * vessel *bound to* San Francisco * * * in the same capacity and at the same rate of wages *for final discharge any time* during the period of time called for by these shipping articles;" and the *discharge of the cargo,* even if a chief steward had anything to do with or service to perform relating *to cargo,* does not keep in force or terminate the shipping articles or the voyage as to the crew, otherwise the wages of every member of the crew would continue as under the articles, they could not leave the service of the ship and the ship could not discharge or even pay them, until the cargo was discharged, although none of the crew had any duty to perform in discharging cargo; the idea that the voyage commences when the ship *begins* to receive and *ends* only when it discharges its cargo, means *as to that cargo,* for the purpose of fixing the duties, responsibilities and rights of *the shipper and carrier* of that cargo, and not of a member of the crew who has no relation to the cargo.

In *The Mermaid,* 115 Fed. 13, 14, 15, by Judge *Gilbert* and concurred in by Judge *Ross* this, Court construed similar shipping articles, and treated them as articles for a *voyage,* the *voyage* being limited to a term of not exceeding *six* months; this Court said:

> "They describe the voyage in the following words: 'To ports in the district of Alaska within the Behring Sea and Arctic Ocean, and also other ports and places in any part of the

world, as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding six calendar months.' The statute (section 4511, Rev. St.) requires that the shipping articles shall state 'the nature, and so far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.' The articles in question undoubtedly comply with the second and third of these three statutory requisites. They state the duration of the intended voyage, and the country at which it was to terminate. These are obviously the most important features of the contract, so far as it concerned the seaman. They informed him of the length of time of his engagement, and, in a general way, of the place of his discharge. In describing the nature of the voyage, the terms used in the articles are, it may be conceded somewhat indefinite, but not so indefinite we think, as to render the articles void. They state in general terms that the voyage is from Port Blakely, the port whence the vessel cleared, 'to ports in the district of Alaska within the Behring Sea and Arctic Ocean', and 'back to a final port of discharge in the United States'. It is true that there is inserted in the description, in addition to the specified ports of destination, 'also other ports and places in any part of the world, as the master may direct', but it was evident to a seaman shipping on a brig from Port Blakely to ports in the district of Alaska in Behring Sea and 'back to a port in the United States' that there could not be, within the limit of the specified six months, any very extensive deviation from that voyage. We think the articles gave the seaman the essential information he was entitled to have. It advised him that the vessel was to go to ports in the district of Alaska in the Behring Sea, which

could only mean Nome or St. Michaels or some other port within reasonable distance therefrom, and thence to make a return voyage back to some port in the country whence she sailed. We do not think it was the intention of congress in enacting the statute to require owners of sailing vessels engaged in the coastwise trade to specify at the inception of each voyage all the ports at which the vessel might touch, or to deprive the master of the power to exercise a reasonable discretion in touching at other convenient ports, and availing himself of the opportunities afforded by the exigencies of trade. If such had been the intention of the statute, it would undoubtedly have been expressed in terms. All that is exacted is that the nature of the intended voyage be described."

And in *The Grace Dollar* (C. C. A.), 160 Fed. 906, 907, Judge *Gilbert,* Judge *Ross* and Judge *Morrow* concurring, said:

"The shipping articles described *the voyage* as follows: 'From the port of San Francisco, Cal., to Portland, Ore., and other Columbia River ports, and return to San Francisco for final discharge either direct or via one or more ports on the Pacific Coast, north or south of the port of discharge, as the master may direct; voyage not to exceed six calendar months'."

The Court (p. 907) said:

"The statute requires that the shipping articles set forth 'the nature and so far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate'. This is one of the many provisions that have been enacted for the protection of seamen, who are regarded as the wards of the nation. Its object is to

prevent the entrapping of seamen into a voyage of greater length or of more peril or labor than that which they have assented to and for which they ought to receive increased wages. Such a statute should receive a reasonable construction. Obviously, it is important that the mariner shall be informed in a general way of the general course of the voyage, but the essential requisites of the statute are that he shall know the duration of the voyage and the port of his final discharge. The Mermaid, 115 Fed. 13, 52 C. C. A. 607. It is not always feasible to name, at the outset of a voyage, all the ports to which the demands of trade may carry the vessel, and it is not necessary that the seamen be advised of all the operations of the voyage, and especially is this true of a coastwise voyage. To hold otherwise would be to impose burdensome and destructive restrictions on commerce without conferring any substantial benefit on seamen. British legislation on this subject has been influenced by the same protective policy as our own. The English merchant shipping act of 1854 (section 149) provided that the shipping articles should, among other things, set forth 'the nature and, so far as practicable, the duration of the intended voyage or engagement'. But in 1873 the section was so amended that the agreement, instead of stating the nature and duration of the intended voyage or engagement, may 'state the maximum period of the voyage or engagement, and the places or ports of the world (if any) to which the voyage or engagement is not to extend'."

The Grace Dollar (D. C.), 149 Fed. 793.

In *The Falls of Keltie,* 114 Fed. 357, 359, the question was raised and decided that similar language in the shipping articles there, as that in

the articles here, "must be construed as a contract *for a voyage,* and not for a *term* of three years"; and the Court says:

> "It is my opinion that the contract must be construed as a contract for a voyage, and not for a term of three years. The agreement certainly binds the libelants to continue in the service of the ship, if required, after her arrival at Shanghai, and while trading to and fro within the limits mentioned, for a period not to exceed three years. This period is in addition to the time required for making the run from New York to Shanghai and return to a port in the United States, United Kingdom, or continent of Europe; but the phraseology of the contract excludes the idea that the libelants became bound for a term of three years, unless required to serve while the vessel should be engaged in trading to and fro between Shanghai and ports other than any port of the United States, United Kingdom, or continent of Europe. The contract is explicit that the voyage is to end at a port in the United States, United Kingdom or continent of Europe; and, as there are many ports in the countries named, and no one in particular is designated as the port at which the voyage should end, the master or owner could choose any port in either of those countries, but could only choose one port; and upon arrival of the ship at a port in the United States the voyage specified was terminated, and the contract was fully performed on the part of the libelants, so that they became entitled to claim their discharge and payment of their wages."

Also

In re Chung Fat, 96 Fed. 202, 204.

The shipping articles in this case were for *a voyage only* commencing July 24, 1913 (Tr. p. 54), and

the voyage *terminated* on September 24, 1913 (Tr. p. 56, "date of termination of *voyage* 9-24-13", meaning September 24, 1913), when appellee was paid in full before and by the United States Shipping Commissioner as required by law, and discharged and released from the articles.

Section 4552, R. S., states what must be done on discharge of seamen:

> "1st. Upon the *completion* before a Shipping Commissioner of any *discharge and settlement*, the master * * * *and each seaman* shall sign a *mutual release* of all claims for wages in respect of the past voyage or engagement. * * *"
>
> "2d. Such *release* so signed and attested, shall operate as a mutual *discharge* and settlement of *all* demands for wages between the parties thereto, on account of wages, in respect of *the past voyage* and engagement."

The shipping articles and voyage were ended, appellee paid off in full and discharged from the articles on September 24, 1913, and he remained on board according to the custom of the *appellant* (not custom *of the port*, as stated in Opinion, Tr. p. 88, as no such custom was proved).

That this is true, is *demonstrated* by:

1. The *libel* says (Tr. p. 5): "That in the month of *September*, * * * at the port of San Francisco * * * said respondent * * * *did hire libellant to serve as* chief steward * * * for *part of a voyage* from" Balboa and to Balboa, at the wages of $100 per month, and an allowance of

$1 per day for *victualling* money; and that in pursuance of *said* agreement the libellant *entered the service* of the respondent as such chief steward on board the said steamship on the forenoon of September 25.

Here is the emphatic declaration under oath in the libel, that appellee was hired and entered *the service* of appellant, *for part* of a voyage, *on September 25,* 1913, while the shipping articles were dated *July* 24, 1913, and appellee was *paid off* September *24,* 1913.

How then, is it possible to say (a) that a voyage and engagement of the articles had not expired as to appellee; or (b) that appellee was "a seaman *shipped* under an agreement", the articles which had expired? He was not *shipped* at all during this time.

2. Appellant pleaded the shortage of silverware as a *set-off* (Tr. pp. 13-15); and the learned proctor for appellee *excepted* to our answer, and in each of three several exceptions stated his objection to be that the matter of shortage pleaded as a set-off did *not arise* out of the *same contract* set forth in the libel, viz: "*a contract entered into on the twenty-fifth* day of September, 1913, and terminated on the first day of October, 1913" (Tr. pp. 17-18).

The appellee himself says in the libel, that he is not claiming anything under or by reason of the articles; and why should that Court say he is?

3. On the *trial,* the appellee himself swears he signed in July, 1913, and returned from *that voyage* September 23, 1913, and was *paid off* by the Shipping Commissioner *"my wages due me for that voyage"* (Tr. p. 21).

The learned proctor for appellee stated on the trial: The appellee " * * * was on the vessel *after he had been released from the shipping articles"* (Tr. p. 35). Again emphasizing the fact that the shipping articles and the voyage under them, so far as affects the appellee, were gone, they were a "story told"; and we cannot believe this Court is going to allow appellee to be helped out by shipping articles that he and every one else, including the trial Court, treated as ended and terminated.

4. The learned District Judge, in his opinion and findings (Tr. pp. 58-61), said:

> "Libellant shipped as chief steward, on respondent's steamship 'City of Sidney', in July for round trip voyage from San Francisco to Balboa. The voyage ended in September, and on September 24th libellant received from the Shipping Commissioner all of his wages therefor.
>
> *"The 'City of Sidney' makes regular trips between these ports,* and while in San Francisco, during the time this controversy arose, was engaged in discharging freight brought in, and loading freight for the next trip. It is the custom for the employees to remain on duty while in port unless they receive notice of discharge from such employment, and *to sign articles for the next trip on the day preceding the next sailing day.* While in port they receive

what is known as port pay, that is to say, their *regular wages plus one dollar per day for victualing,* as no meals are served on the vessel during her stay. Following this custom libelant, having received no notice of discharge, remained in the service of respondent while the 'City of Sidney' was discharging and receiving freight *for its* next trip, *from September 25th to October 1st, inclusive.* Upon October 1st he was told that his services would not longer be required. Upon demanding his wages for this service in port he was informed that while his wages amounted to $30.33, he could not receive them, because of the loss of certain silverware entrusted to him as chief steward when he shipped in July and not accounted for by him at the end of the trip on September 24th, or thereafter, and amounting in value to $32.90, which sum respondent claimed the right to offset against his wages of $30.33, earned while in port. This setoff is pleaded as a defense and *libelant interposed exceptions thereto on the ground that it did not arise out of the same contract* as that upon which the suit was brought; that if entitled to offset this loss at all, respondent should have done so at the time the libelant received his wages on September 24th at the end of the voyage for which he shipped, and that the employment of libelant while in port was under a new contract beginning at the time he signed off at the end of the voyage.

"The rule is well settled that in the admiralty Court a setoff to be allowed must grow out of the same transaction as that which must be proved to support the libel. But it seems to me that as there was but one contract of hiring here, that is to say, *the contract entered into in July when libelant shipped* as chief steward, and as he would have to prove this contract in order to claim that *he continued in the employ* of respondent *after receiving his wages*

> *and signing off on September 24th,* by reason of the custom before mentioned, the matters set up are sufficiently connected with the contract upon which he relies to constitute, if sustained, a proper setoff, and for that reason the exceptions to the special defense are overruled."

Thus, it appears demonstrated by this learned judge that appellee's *libel* was untrue; he was *not* hired September 25, 1913, for *any part* of a voyage; he had been employed under an *express written* agreement in the shipping articles, and he *had* been paid off and released therefrom and appellant likewise released from the articles; and appellee simply *remained* on board *without any hiring or agreement* except the *custom* of the appellant that while they remained on board while the ship was in port, appellee would receive the same wages *he did* at sea and $1 per day victualing money; so that, as the learned District Judge says:

> "he would have to prove this contract in order to claim that *he continued in the employ* of respondent *after* receiving his wages and *signing off* on September 24th by reason of the custom before mentioned" (Tr. pp. 59, 60).

5. The learned counsel for appellee, on page 31 of his brief, filed *in the Circuit Court of Appeals,* said:

> "* * * I believe that it is a reasonable conclusion that *there was a new contract of hiring* in pursuance of the custom *for the remainder of the voyage after* appellee had received his wages for the first part of the voyage from the Shipping Commissioner."

It is folly to dispute over whether the voyage *ends* with the discharge or commences with the loading of the cargo, because *the agreement* in this case is in the record, the shipping articles, in which must be contained their agreements, and these articles engage the seamen to serve from San Francisco to Ancon and *back to final discharge* in San Francisco.

The shipping articles in this record are for *a voyage* limited to six months to return *to* San Francisco *for final* discharge; when the vessel arrives at *Ancon,* the destination named, she must return the seamen to San Francisco for final discharge, either on the same vessel or upon another, in the same capacity, and at the same wages; and when the vessel gets "back to a final port of discharge *in* San Francisco" (Tr. p. 54), under the express contract in the articles, the seamen are entitled to final discharge.

The voyage does not *terminate* until an *arrival at* the port of discharge.

U. S. v. Smith, 27 Fed. Cas. No. 16,337.

In *35 Cyc.,* p. 1194, it is said:

> "A seaman's contract generally terminates on the completion of the voyage, and it has been held that he may properly demand payment at that time."

And in note "68", to this statement of the law, *35 Cyc.,* p. 1194, says:

> "*Formerly,* the service of the seaman was considered not to terminate *until* the *discharge*

of the cargo, and consequently he was held not to be entitled to payment of his wages until then." Citing a number of the *old* decisions.

Again, *35Cyc.,* p. 1193:

"but they are not obligated to assist in unloading the cargo at the port of final discharge."

In the case of *Ralli v. New York T. S. S. Co.,* 154 Fed. 286, 287, 288, the Court of Appeals said:

"We are of the opinion that respondent cannot claim the benefit of the section above quoted for the reason that *the voyage had not commenced,* the cargo was not yet all on board, nor the vessel ready to sail."

In *Deslions v. La Bourgogne,* 210 U. S. 95, 135, the Supreme Court, by Chief Justice *White,* said:

"Undoubtedly the word 'voyage' may have different meanings under different circumstances, depending on the subject to which it relates or the context of the particular contract in which the word is employed."

So, in this case, the "voyage" of the "City of Sydney" terminated *as to her crew,* when she arrived at San Francisco, her port of final discharge, and was safely moored; as to her cargo and her relations to its owners, shippers and consignees, and the insurers, these are questions which give a different meaning to the word "voyage", but such meaning in no possible aspect affects the crew of the vessel, or determines when or where or how their service either continues or terminates.

III.

The "City of Sydney" was engaged in the *coastwise* trade between San Francisco and Balboa; Section 4529, R. S., containing this penalty, was taken from the "Shipping Commission Act" of June 7, 1872 (17 Statute 262), and was repealed by Act of June 9, 1874 (18 Statute 64), which latter Act expressly declares that *"none of the provisions"* of the Shipping Commission Act, *"shall apply* to * * * steam vessels engaged in the coastwise trade, *except* the coastwise trade between the Atlantic and Pacific Coasts", etc.; and Section 2447, R. S., which provides for shipping crews in the *coastwise* trade, also, expressly declares: "* * * Such seamen shall be discharged and receive their wages as provided by the *first clause* of Section 4529", and the penalty for not paying is found *not* in the first, but in the *second* clause of Section 4529, R. S. (*U. S. v. The Grace Lathrop,* 95 U. S. 527; *Id.,* 536; *Wilson v. Manhattan C. Co.,* 205 Fed. 996).

Section 4529, Revised Statutes, does not apply to this vessel in the *coastwise trade,* because that section was taken from the "Shipping Commission" Act of June 7, 1872, and was, so far as coastwise trade like the vessel here was engaged in, *repealed* by the Act of June 9, 1874 (C. 260, 18 Stat. L. 64, 6 Fed. Stat. Ann. 850, U. S. Comp. St. 1901, p. 3064), which later Act provides:

> 'That *none of the provisions* of an act entitled 'An act to authorize the appointment of

shipping commissioners by the several Circuit Courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States and for the further protection of seamen' *shall apply to* sail or *steam vessels* engaged *in the coastwise trade,* except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

In *Wilson v. Manhattan Canning Co.,* 205 Federal 996, 997, the Court said that if Section 4527, Revised Statutes, includes cases other than those of wrongful discharge, *it is inapplicable to a coastwise voyage* of the nature of the one set up in the libel.

Also:

The George B. Ferguson, 140 Federal 955, 956;

The Elihu Thompson, 139 Federal 89;

U. S. v. Smith, 95 U. S. 536.

Section 2447, Revised Statutes, provides for *shipping crews in the coastwise trade,* and *expressly* declares that:

"*such seamen shall be discharged and receive their wages* as provided by *the first clause* of Section 4529 (and the *penalty* for *not* paying is not found in the *first* clause but in the *second* clause of Section 4529), and 4526, 4527, 4528, 4530, 4536, 4542, 4545, 4546, 4547, 4549, 4550, 4551, 4552, 4553, 4554, and 4602, of the Revised

> Statutes; *but in all other respects* such shipment of seamen and such shipping *agreement* shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

The "City of Sydney" was engaged in the coastwise trade, as provided for by Section 2447, Revised Statutes, and *the first clause only* of Section 4529 is applicable thereto; and the appellee *never shipped or signed any agreement* either in the coastwise trade or at all, *after he returned* from the round voyage to Balboa on September 23, 1913, and *was paid* for that round voyage *in full* on September 24, before the United States Shipping Commissioner, *and signed off the articles.*

IV.

The District Court in its admiralty and maritime jurisdiction *in personam*, had no power to hear and determine this cause; the case is not within the admiralty and maritime jurisdiction of that Court; and the port or shore services of appellee were *not* a maritime service for which a libel *in personam* would lie, and if entitled to sue at all in the Admiralty, it could only be *in rem.*

In *The Queen v. The Judge of the City of London Court, etc.*, 25 Q. B. D. 339, the facts are thus stated:

> "This was an action *in rem*, brought on the Admiralty side of the City of London Court against the steamship Michigan, by one

H. Barnes, to recover a sum of 45£ 12s. 10d., due to him as mate of the said ship for wages and victualling money. The Michigan was a vessel belonging to the port of London. The plaintiff had made several voyages in her as chief mate. Some time in the first week of November, 1889, she arrived in the port of London on a voyage from America, and on the 8th of that month the whole of the crew, including the plaintiff, were duly paid off. As on previous occasions, the plaintiff, after being paid off, and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner at the same rate of wages as he had had while at sea, with an addition of 2s. 6d. a day for victualling-money while the vessel remained in port. He remained on board for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After a portion of the outward cargo had been loaded, repairs were found to be necessary; in December the ship was taken into the Victoria Graving Dock, and the plaintiff continued on board to superintend the repairs. In March the owner of the ship became bankrupt, and there was then due to the plaintiff for wages for his said services on the ship while in port and for victualling-money the sum of 45£ 12s. 10d. He accordingly instituted the present action. The judge held that he had no jurisdiction to entertain the action, on the ground that the plaintiff, not having been on the ship's articles at the time in respect of which the wages were claimed, was not at that time a seaman within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and consequently had no maritime lien for such wages. He accordingly dismissed the action."

"*Lord Coleridge, C. J.* We have had an opportunity of consulting the learned judge of

the Admiralty Court, who has had a large experience in these matters, and although my own impression was at first the other way, I defer to his authority, and come to the conclusion that the county court judge was wrong, and that an action *in rem* will lie at the suit of a person in the position of the present plaintiff. To allow of *that remedy* in such cases as this has, it appears, been the practice of the Admiralty Court."

"*Wills, J.* I am of the same opinion. I have had the opportunity, not only of speaking to my brother Butt upon the subject, but also of looking into the question for myself, and, upon consideration of the authorities, I have independently arrived at the same conclusion. The case seems to me to be practically governed by the case of The Jane and Matilda (1), where Lord Stowell held that the woman who had acted as caretaker was entitled to *claim against the ship*—a decision which, so far as I can make out, seems to be entirely in accordance with the uniform current of authority. The right to proceed *in rem* for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons *in harbour* just as much as to services rendered by them at sea.

"It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually *in harbour* at the time."

In the recent case of *California-Atlantic S. S. Co. v. Central Door & Lumber Co.,* 206 Federal 5, 10-11, this Court said:

> "So also, there is a line of cases which hold that the jurisdiction *in the Admiralty* of libels for *seamen's wages* for services rendered depends upon the question whether the services were substantially performed or to be performed upon the sea or navigable waters connected therewith. * * * No presumptions arise in favor of the jurisdiction of the federal Courts. Ex parte Smith, 94 U. S. 455, 24 L. Ed. 165. On the contrary, the legal presumption is that every case is without their jurisdiction unless the contrary affirmatively appeals."

This vessel, the "City of Sydney", was tied up to her dock at her home port or port of final discharge, discharging cargo on the termination of her round voyage and loading cargo for her next voyage. The appellee had been chief steward on the round voyage, and on its termination at this port on September 23, the appellee was paid his wages in full and discharged from the articles. The appellee continued upon the vessel, cleaning up and receiving the stores for the next voyage. Appellee was on shore pay, his services were shore services, and he had absolutely nothing to do with the navigation of the vessel in any way.

In *The Sirius,* 65 Federal 226, an action in admiralty for seamen's wages, for the services of a marine engineer upon a vessel that was not then engaged in navigation, Judge Morrow dismissed the

libel, rendering an admirable and exhaustive opinion on the subject.

Also:

The Fortuna, 206 Federal 573;
The Sinaloa, 209 Federal 287.

> "To justify a person employed on a vessel in suing in Admiralty, the service rendered must be essentially maritime."
>
> *1 Cyc.,* p. 832.

Services rendered in port putting in machinery in a vessel and as a fireman, were held to be not maritime services.

Walter v. The Kamchatker, 29 Fed. Cas. 17, 119;
Graham v. Hoskins, 10 Fed. Cas. 5, 669.

We therefore respectfully submit that the Circuit Court of Appeals erred in remanding said cause with directions to the District Court to enter a decree allowing to respondent and against this petitioner one day's pay ($4.33) for every day since the date of the final decree in the District Court, and in adjudging that the penalty provided for in Section 4529, R. S., continues, notwithstanding the final decree in the District Court, and notwithstanding the appeal and supersedeas, during the period elapsing after the date of the final decree of the District Court and until the amount of the original $30.33 wages shall be actually paid; and

that the Circuit Court of Appeals erred in not reversing and ordering dismissed the said libel in personam, and for such other relief, order and judgment of the Supreme Court as shall appear just and proper in the cause here presented.

Dated, San Francisco,
January 6, 1915.

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys and Proctors for Petitioner.

FILED
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JAMES D. MAHER
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No. 323

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914

PACIFIC MAIL STEAMSHIP COMPANY,
Petitioner,

vs.

ED SCHMIDT,
Respondent.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

JOHN L. McNAB,
Proctor for Respondent.

JAMES W. RYAN,
Of Counsel.

Filed this _____ *day of January, 1915.*

JAMES D. MAHER, Clerk.

By _____ *Deputy Clerk.*

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Statement of the Case.

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Argument.

I.

BOTH THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS HAVE HELD IN THIS CASE THAT THE PETITIONER NOT ONLY HAD INSUFFICIENT CAUSE IN LAW FOR WITHHOLDING THE SEAMAN'S WAGES, BUT THAT IT HAD NO REASONABLE OR FAIR CAUSE FOR DOING SO OR FOR BEGINNING THE CONTROVERSY.

It should be noted that nowhere in their brief do counsel for petitioner argue the merits of the

case. In its opinion the Circuit Court of Appeals said (*Pacific Mail S. S. Co. v. Schmidt,* 214 Fed. 513, 519-520):

> "The trial court in the instant case was, in our opinion, right in holding that the set-off pleaded in defense of the libel was not sustained by the evidence. There was nothing tending to show any bad faith on the part of the steward, or even tending to show any negligence or lack of care on his part in the performance of his duties; nor was there, as said by the trial judge, sufficient evidence of the alleged missing articles ever having been delivered into his keeping. On the contrary, the appellant's San Francisco port steward testified that it was usual on voyages for a small amount of the silverware of the ship to be taken by the passengers 'for souvenirs, and for medicine, and for one thing and another' —usually $5 or $6 worth, said the witness. In the present case the amount claimed to have been lost was, as has been said, of the value of $32.90.
>
> "We are of the opinion that no sufficient cause was shown for the refusal of the appellant to pay the libelant his wages upon his discharge from service. * * *
>
> "The further contention is made that it has been uniformly held that the penalty will not be imposed in any case where there is a fair ground of dispute. Conceding the justice of the rule, we are of opinion that *the evidence in the present case does not show any such fair ground of dispute.*"

II.

IT IS SOLELY PETITIONER'S FAULT THAT THE WAGES CONTINUED, BECAUSE IT COULD, AT ANY TIME AFTER THE LIBEL HAD BEEN FILED IN THE DISTRICT COURT, HAVE PREVENTED THE CONTINUANCE OF THE WAGES BY REQUESTING AN ORDER OF COURT SIMILAR TO THE ONE AFTERWARDS GRANTED TO IT BY THE CIRCUIT COURT OF APPEALS.

Petitioner cannot in seriousness contend that it objected to the continuance of the wages after the date of the filing of the libel in the District Court, because it could at any time after the libel had been filed, either before or after the entry of the decree in that Court, have prevented their continuance by paying the seaman the actual amount of wages which both Courts have held it had not only insufficient cause in law, but neither reasonable nor fair cause, for withholding from him, and by depositing with the clerk of the Court, subject to final disposition by the Court, the additional amount of wages which had accrued up to that time, either pursuant to an order of Court which it could easily have obtained, or without such an order. That point is decided in the very case (*Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 46) cited by petitioner with regard to another point in its brief on this petition, and which was referred to on a different matter in the dissenting opinion of Judge Dietrich in the Circuit Court of Appeals. It is very evident that

the wages were allowed by petitioner to continue because, realizing that no appellate Court would decide that a steamship steward, in the absence of negligence, is liable as an insurer of silverware which is not shown to have been entrusted to him and which at most was stolen by passengers or lost, it wished to obtain some ground of plausibility for an argument that its right of appeal was abridged because the wages continued, and thus possibly have the case decided otherwise than upon its merits. The fact that when petitioner first suggested or asked that it be permitted to pay the seaman the actual amount of wages unreasonably and unfairly (as both Courts have held) withheld from him, and that the additional wages which had accrued up to that time be impounded with the clerk of the Court, subject to final disposition by the Court, the Circuit Court of Appeals made an order that petitioner be permitted to pay the seaman the wages found by the District Court to have been due him, and to deposit with the clerk of the Court, subject to final disposition by the Court, the additional wages due at the date of petitioner's request *and that thereupon it be ordered that the wages cease to continue,* conclusively proves that, assuming that such an order was necessary, petitioner could have obtained it immediately after the filing of the libel in the District Court or at any time thereafter or immediately after the entry

of the decree in that Court, and thus have prevented the wages from continuing after that time. As further proof that petitioner, for the reason above mentioned, did not wish the wages to cease continuing, and that it was solely its fault that the wages continued after the libel had been filed in the District Court, it should be noted that, notwithstanding it obtained the order above referred to from the Circuit Court of Appeals, petitioner did *not* comply with it or deposit the wages then due with the clerk of the Court, and did not include a copy of that order in the transcript of the proceedings in the Circuit Court of Appeals filed in this Court, obviously because it did not wish this Court to know that such an order had been made. A copy of that order, certified to by the clerk of the Circuit Court of Appeals, is attached to the original of this brief, and the order is copied herein for the convenience of the Court.

> "At a stated Term, to wit: the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the Sixth day of October, in the year of our Lord One Thousand Nine Hundred and Fourteen:
>
> "Present: The Honorable William B. Gilbert, Circuit Judge, Presiding, Honorable Erskine M. Ross, Circuit Judge, Honorable William W. Morrow, Circuit Judge. The Clerk and the Crier.

No. 2352

Pacific Mail Steamship Company,
Appellant,

vs.

Ed. Schmidt,
Appellee.

ORDER

on Motion for Order Allowing Appellant to Deposit in Registry of District Court Wages Awarded by Decree of District Court, etc.

"In this cause, upon submission and due consideration of the motion of appellant, it is ordered that the appellant pay to proctor for appellee the amount of the judgment as rendered by and entered in the District Court to the date of that judgment, together with the costs and proctor's fees allowed in the District Court, and it is further ordered that within ten days the appellant pay to and deposit with the clerk of the District Court the additional amount to date of such deposit of the penalty adjudged by the judgment on appeal of this Court as continuing and accruing from the date of the judgment in the District Court, and that the amount of such payment to and deposit with the clerk of the District Court be impounded and held by the clerk of the District Court subject to and be paid to the appellee in the event that a writ of certiorari be denied by the Supreme Court, and to be refunded and repaid to appellant in the event that the Supreme Court should allow a writ of certiorari and finally reverse the judgment of this Court as to the said additional and continuing penalty imposed by the judgment of this Court; and it is further ordered that upon such payments and deposit being made by appellant the running of said penalty shall

cease in so far as the judgment of this Court is concerned."

In the case above referred to (*Massachusetts v. Western Union Tel. Co.,* 141 U. S. 40, 46) this Court said:

> "In each case the defendant admitted its liability to pay a tax on the actual value, as stated in its answer, of its real and personal property within the State; and tendered, and paid into court, the sum so admitted to be due, with interest thereon at the rate of twelve per cent, and costs. * * * It is contended, in behalf of the State, that the tender and payment into court could have no effect in a suit of this kind to recover a tax, with interest thereon at the rate of twelve per cent in the nature of a penalty; and that such interest must be computed at that rate, not merely to the time of the decree below, but to the time of payment, or at least to the time of the final decree in this court. * * *
>
> "We are of opinion that in this matter, the defendant is right. In equity, at least, the defendant was entitled to the benefit of the sum paid into court. That sum should have been applied to that part of the principal sum and interest which was admitted to be due."

III.

IF A SEAMAN'S WAGES ARE NOT PAID WHEN DUE, SECTION 4529, R. S., CREATES A NEW AND DISTINCT CAUSE OF ACTION DAILY FOR WAGES "FOR EACH AND EVERY DAY" THEREAFTER UNTIL PAID.

Section 4529 of the Revised Statutes, as amended by the Act of December 21, 1898, so far as it is here involved provides:

> "Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay FOR EACH AND EVERY DAY during which payment is delayed beyond the respective periods, *which sum shall be recoverable as wages* in any claim made before the court."

The provision that the "sum shall be recoverable as wages" shows that the statute creates a remedy for the redress of an injury to the seaman, and is therefore to be construed liberally in his favor, and does not create a penalty for the punishment of a public wrong and thus become subject to the principle requiring strict construction of statutes creating penalties. In *36 Cyc.*, 1182, it is said:

> "The true test in determining whether a statute is penal is whether the penalty is imposed for the punishment of a wrong to the public, or for the redress of an injury to the individual." (Citing cases.)

The provision that the seaman shall be paid "a sum equal to one day's pay FOR EACH AND EVERY DAY during which payment is delayed" gives the seaman *a new and distinct cause of action* at the end of each day for his wages for that day, exactly as if he were continued in employment, not at monthly wages, but as a day-laborer at a daily wage. Therefore, failures on successive days to pay the seaman the wages due him constitute separate and distinct breaches of the contract of employment, and subject the master or owner to a separate and distinct action for each breach.

As said in *Freeman on Judgments* (4th ed., Vol. I, § 242, p. 427) with reference to merger of causes of action in a judgment for damages suffered from a nuisance:

> "The material inquiry in the second action is whether the damages on which it is based are attributable to the original act, *or to the continuing of the state of facts produced by that act. In the latter case a new cause has arisen, and a new action will lie.* * * * For, while a trespasser is under no obligation to rebuild or replace what he has torn down or destroyed, he who creates a nuisance is under a continuing obligation to abate it."

Similarly in the case at bar, the petitioner was "under a continuing obligation" to pay the seaman his wages, and the wages continued to accrue pursuant to the statute not because of the failure to pay them when they first became due, or "originally", but because of the "continuing of the state of facts produced by" that failure to pay them.

Moreover, as the statute provides that the wages shall continue accruing "for each and every day during which payment is delayed", and as the time of payment depended upon the arbitrary and capricious will of petitioner itself, it would have been absolutely impossible for the District Court to have known how long payment would be delayed or to grant complete relief for delay in payment occurring after the entry of the decree by entering a decree in any amount computed otherwise than upon conjecture or speculation. Therefore to so construe the statute as to make

it read that only one cause of action was created in favor of the seaman would impose an impossible task upon the District Court and cause the statute to become ineffective and useless for the purpose which it was obviously intended to subserve.

The general principle is stated in *30 Cyc.*, 1339, as follows: "Where a penalty is given for failure or neglect to do a certain act, and a further penalty for each day during which such refusal or neglect shall continue, a liability arises for a succession of penalties, * * * which may be recovered in successive actions."

IV.

NEW AND DISTINCT CAUSES OF ACTION ACCRUING AFTER A DECREE ON EARLIER CAUSES OF ACTION ARISING OUT OF THE SAME TRANSACTION ARE NOT MERGED IN THAT DECREE.

The statements of writers on legal subjects quoted by petitioner to the effect that an appellate Court will not grant further relief as to causes of action accruing *before* and determined by the decree of the lower Court have obviously no application to this case, because here the additional relief granted was as to new and distinct causes of action accruing *after* the entry of the decree of the lower Court and during the time that the Circuit Court of Appeals had jurisdiction of the case.

V.

IN ORDER TO AVOID A MULTIPLICITY OF SUCCESSIVE ACTIONS ARISING FROM SEVERAL BREACHES OF THE SAME CONTRACT OF EMPLOYMENT, A COURT OF ADMIRALTY WILL, LIKE A COURT OF EQUITY, GIVE A SEAMAN COMPLETE RELIEF IN ONE PROCEEDING.

The Courts of Admiralty of the United States have the same powers as the English Courts of Equity with respect to seamen's wages. In *Pomeroy's Equity Jurisprudence,* (3d ed.) Vol. 2, § 952, p. 1739, it is said:

> "From the peculiar qualities which, as is well known, belong to sailors as a class, from the circumstances in which they are placed, and the temptations to which they are exposed, courts and legislatures have long treated them as almost *non sui juris,* as analogous to infants or expectant heirs, and therefore as, in some respects, wards of court. *It seems to be settled that equity has jurisdiction over contracts by sailors concerning wages made with their employers,* * * * and will scrutinize such agreements with the utmost vigilance, and will cancel them if they are at all unfair, one-sided, or otherwise inequitable." (Citing several English cases.) Note: "If this jurisdiction was ever exercised by the American courts of equity * * * it has been made obsolete by the stringent legislation of Congress for the protection of sailors which may be enforced by the United States courts."

Therefore, in order to avoid a multiplicity of successive actions arising from several breaches of the same general contract of employment, a Court of Admiralty will, like a Court of Equity,

give the seaman complete relief in one proceeding; that is, it will give him relief not only as to causes of action which accrued before the commencement of the action or before the entry of a decree by a lower Court of Admiralty, but will, as was done in the case at bar, give him relief as to all causes of action arising out of the same contract of employment which have accrued during the time that the Court of Admiralty, in its lower and appellate divisions, has had jurisdiction of that contract and the several breaches of it, and up to the time that the Court, in its appellate division, has finally disposed of the cause and lost jurisdiction. A Court of Admiralty in granting relief to a seaman certainly has as much power as Courts of Equity universally exercise in order to avoid numerous successive actions arising out of the same transaction by granting permanent injunctions to restrain the commission of breaches or injuries, by awarding complete relief in the form of damages for all injuries suffered to the date of the decree, and by retaining jurisdiction of the entire transaction or contract even after the decree in order to enforce compliance with the decree by awarding relief for damages suffered from breaches or injuries of the same character arising out of the same transaction or contract and occurring after the entry of the decree. But in the case at bar the Circuit Court of Appeals has exercised no extraordinary power, having merely awarded relief as to causes of action arising out

of the same contract and accruing and determined before the issuance of its mandate.

The powers of the various Courts in an action for wages with respect to causes of action for daily wages accruing during the pendency of the action are exactly the same as their powers with respect to a continuing nuisance. It has been universally held that a continuing or temporary nuisance creates new and distinct causes of action accruing immediately after each omission to abate the nuisance, and that an action may be commenced at the end of each day for the damages suffered during that day from such omission to abate. *Baltimore etc. R. Co. v. Fifth Baptist Church,* 137 U. S. 568, 575. In an action at law the Court will award only the damages suffered from the several causes of action accruing before the commencement of the action, together with interest from the entry of its judgment on the amount awarded, the Courts of law requiring that another and successive action be brought for damages arising out of causes of action accruing after the commencement of the first action. A Court of Equity, however, will in such a case award in one proceeding all damages suffered up to the time of its final decree, retain jurisdiction for an indefinite time by permanently enjoining the continuance of the nuisance, and award damages and exercise its power in regard to contempt of court for all breaches or injuries of the character enjoined occurring after the entry of its final decree.

A Court of Admiralty, being in substance a Court of Equity, would have similar powers with respect to a seaman's claim for wages should occasion arise requiring their exercise.

As ample justification for the action of the Circuit Court of Appeals in the case at bar, it should be particularly noted that no additional proof could be required to support the causes of action accruing after the commencement of the action other than of the mere failure of the petitioner on successive days—"for each and every day"—to pay the seaman his wages.

VI.

THE VESSEL IN THE CASE AT BAR WAS ON A FOREIGN, NOT A "COASTWISE" VOYAGE, AND THEREFORE THE ARGUMENT ON PAGES 34 TO 36 OF PETITIONER'S BRIEF IS IRRELEVANT TO ANY ISSUE IN THE CASE.

On pages 34 to 36 of its brief on this petition petitioner copies part of its brief in the Circuit Court of Appeals with reference to the vessel in the case at bar being on a "coastwise" voyage, which was not answered or mentioned in the opinion of that Court because of its being so clearly without merit. The shipping articles show that the master of the vessel on leaving San Francisco obtained a certificate from the Deputy Collector of Customs at that port (Apostles, page 57) required by Section 4573 of the Revised Statutes, and

authorized to be given, only in case of a foreign voyage, and that the voyage was from San Francisco to Ancon, Canal Zone,—which, though leased to the United States, is part of the Republic of Panama,—"and such other ports and places *in any part of the world* as the master may direct".

Furthermore, it is common knowledge in shipping circles on the Pacific Coast that vessels (of which this vessel was one) following what is known as the "Central-American trade route" load and discharge cargoes on each of their voyages at ports in various foreign countries, among which are Guatemala, Salvador, Honduras and Nicaragua.

VII.

THE SHIPPING ARTICLES WERE IN FORCE DURING THE ENTIRE TIME THAT THE SERVICES UPON WHICH THE LIBEL IS BASED WERE BEING PERFORMED.

Petitioner contends in its brief on this petition (at pages 17 to 34) that respondent was not a "seaman shipped under an agreement", and that the shipping articles under which he claimed to be serving had expired, but as petitioner itself introduced in evidence shipping articles showing that respondent "shipped under an agreement" for a voyage from San Francisco to Balboa and return, and *the libel is for services performed during part of that voyage*, and as both the District Court and

Circuit Court of Appeals have held that that voyage had not ended so far as petitioner was concerned, he having performed the services upon which the libel is based on board the vessel in assisting with the business in which the vessel was engaged on that voyage by unloading the empty bottles and soiled linen used by the passengers and crew (Apostles, page 49), cleaning the ship, and storing supplies therein, and as, the voyage not having ended, the shipping articles for that voyage were still in force notwithstanding respondent had received his wages for part of that voyage, and notwithstanding a deputy shipping commissioner had made a clerical error by inserting the date when that part of the wages was received in the column of the shipping articles which should have been reserved for the date when the wages in full for that voyage were paid, respondent was clearly serving under those shipping articles and was therefore within the provisions of Section 4529 of the Revised Statutes.

The argument of petitioner on pages 21 to 27 of its brief is unquestionably based upon a misapprehension of the reasoning in the opinion of the Circuit Court of Appeals.

Conclusion.

It is respectfully submitted that the decree of the Circuit Court of Appeals is clearly right, and therefore that the petition for a writ of certiorari should be denied.

Dated, San Francisco,
January 25, 1915.

Respectfully submitted,
JOHN L. MCNAB,
Proctor for Respondent.

JAMES W. RYAN,
Of Counsel.